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No. (1)

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

JEAN BOUDREAUX, and the victims of the Flood on April 6, 1983, on the Tangipahoa River,

Petitioners,

—v.—

THE STATE OF LOUISIANA, DEPARTMENT OF TRANSPORTATION, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

MAX FOLKENFLIK, ESQ.
Counsel of Record
FOLKENFLIK & MCGERITY
1500 Broadway, 21st Floor
New York, New York 10036
(212) 757-0400

BYARD EDWARDS, JR., ESQ.
1090 West Pine Street
Ponchatoula, Louisiana 70454
(985) 386-3148

HENRY G. TERHOEVE, ESQ.
GUGLIELMO, MARKS, SCHUTTE, TERHOEVE & LOVE
320 Somerulos Street
Baton Rouge, Louisiana 70821
(225) 938-5586

Attorneys for Petitioners

QUESTIONS PRESENTED

1. Whether a final $91 million Louisiana judgment against the State of Louisiana is final for the purposes of the Full Faith and Credit Clause where under the Louisiana Constitution the sole means of enforcement of the judgment against the State is a payment appropriated by the State legislature and the legislature has refused to pay the judgment? Put differently, can the state legislature through inaction nullify the finality of a judgment for Full Faith and Credit purposes?

2. Whether it violates the Full Faith and Credit clause and the Privileges and Immunities clause for New York to deny Louisiana citizens enforcement of a final Louisiana judgment on the basis that while New York citizens would be guaranteed enforcement New York has "no compelling interest" in providing for enforcement to Louisiana citizens because "[t]he rights of New Yorkers are not involved in this matter at all"?

3. Whether it violates the Full Faith and Credit Clause for New York to defer to Louisiana enforcement procedures, but still refuse to allow the docketing of a final Louisiana Judgment in New York even though that judgment was required to be docketed in Louisiana under Louisiana law?

LIST OF PARTIES – Rules 14.1(b) and 29.6

A. Parties Originally Named in New York Supreme Court.

Jean Boudreaux, on behalf of a class the victims of the Flood on April 6, 1983, on the Tangipahoa River.

B. Changes of Parties in the Appellate Division or the Court of Appeals.

None.

CORPORATE DISCLOSURE STATEMENT

Not applicable.

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The opinion of the Appellate Division of the Supreme Court is reported at 49 A.D.3d 238 and is reprinted in the Appendix hereto at App. at 8a to 26a.

The oral opinion of the New York Supreme Court is reprinted at App. at 17a to 48a.

JURISDICTION

This Court has jurisdiction over this appeal from a final judgment of the highest court of New York based upon rights petitioners claim under the Constitution of the United States, pursuant to 28 U.S.C. §1257. The New York Court of Appeal denied the petitioners, Louisiana citizens, the right to docket and/or enforce in New York a final judgment against the State of Louisiana. Petitioners asserted the right to have the judgment docketed and enforced in New York under the Full Faith and Credit Clause, Article IV, Section 1 of the United States Constitution. Further, by denying enforcement in part because of a conclusion that New York had "no compelling interest" in providing a forum for redress to Louisiana citizens, the Court of Appeals applied New York enforcement procedures differently for Louisiana citizens than New York would for New

York citizens. As a result, the Court of Appeal acted contrary to the Privileges and Immunities Clause of Article IV, Section 2 of the United States Constitution.

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Full Faith and Credit Clause, Article IV, Section 1 of the United States Constitution, the Privileges and Immunities Clause of Article IV, Section 2 of the United States Constitution, La. Const., Art. XII, §10(A), La. Const., Art. XII, §10(C), Louisiana Revised Statutes, section 13:5109 (B)(2), and New York Civil Practice Law and Rules §5402(a) and §5402(b), are reprinted in the Appendix hereto at App. at 49a to 55a.

STATEMENT OF THE CASE

A. INTRODUCTION

This case presents important constitutional issues under the Full Faith and Credit Clause and the Privileges and Immunities Clause, as well as facts demanding simple justice. In April 1983, 1,286 Louisiana claimants were damaged by a flood as a result of the negligence of the State of Louisiana. *Boudreaux v. Louisiana*, 906 So.2d 695 (La. App. 1st Cir. 2005). Following 23 years of litigation, the liability of the State of Louisiana was finally determined. The Louisiana Supreme Court denied a *writ of certiori* which sought review of the decision of the Louisiana Court of Appeals on damages. *Boudreaux v. Louisiana*, 924 So.2d 1018 (La. 2006). An earlier petition to the Louisiana Supreme court seeking to review the finding of liability was granted and then dismissed. *See*, 815 So.2d 7 (La. 2002) (writ dismissed), 794 so.2d 804 (La. 2001) (*writ of certiori* granted); 780 (So.2d 1163 (La. App. 1st Cir. 2001) (affirming judgment of liability). A

judgment for $91 million plus pre-judgment interest was entered.

The sole mode of obtaining payment from Louisiana under the Louisiana Constitution is limited to seeking a legislative appropriation. La. Const. Art. XII, §10(C). App. at 50a. The Louisiana Legislature has simply refused to pay. Enforcement was sought in New York.

The question below was whether a final judgment by Louisiana citizens against the State of Louisiana can be denied registration and enforcement in New York consistent with the Full Faith and Credit Clause, Article IV, Section 1 of the United States Constitution and the Privileges and Immunities Clause, Article IV, Section 2 of the United States Constitution.

However, embedded within that question is the issue of whether a final judgment of a Sister State's courts may be denied enforcement because the legislature of that state has chosen not to abide by that judgment. To allow legislative inaction to effectively nullify a final judicial ruling runs contrary to constitutional principals settled on the Federal level since *Marbury v. Madison*, 5 U.S. 137 (1803).

Even more at issue here, however, to allow legislative nullification for full faith and credit purposes is completely inconsistent with over a century of settled full faith and credit law as established and re-emphasised by this Court time and again. Until now, full faith and credit law has always required the recognition of final judgments. No other source of "the policy of the state" has been considered. *See, e.g., Baker by Thomas v. GMC*, 522 U.S. 222, 232-233 (U.S.

1998) ("Regarding judgments, however, the full faith and credit obligation is exacting. A final judgment in one State, if rendered by a court with adjudicatory authority over the subject matter and persons governed by the judgment, qualifies for recognition throughout the land.").

The judicial creation of an exception to the full faith and credit requirement for recognition of final judgments is by itself a serious enough issue to merit the attention of this Court.

Equally significant , however, is the disregard the Court of Appeals decision shows for the courts of Louisiana and the vested rights of its citizens. The Court of Appeals held that docketing and enforcement of the judgment against Louisiana could be denied because of the absence of any New York interest in providing a remedy to the Louisiana judgment creditors.

> We agree with the Appellate Division that there is no compelling interest in providing New York as a forum for redress in this case. Indeed, the flood that caused the damage suffered by plaintiffs occurred in Louisiana and all litigation that arose from the flood was brought in Louisiana.. The rights of New Yorkers are not involved in this matter at all.

App. at 6a.

Under settled law "[e]nforcement measures do not travel with the sister state judgment as preclusive

effects do." *Baker by Thomas v. GMC*, 522 U.S. 222, 225 (1998); *accord, Clark v. Williard*, 294 U.S. 211, 213 (1935) (Cardozo, J.) ("Every state has jurisdiction to determine for itself the liability of property within its territorial limits to seizure and sale under the process of its courts . . ."); *Chicago, R.I. & Pac. Ry. Co. v. Sturm*, 174 U.S. 710, 717-718 (1899) ("[E]xemption laws are . . . part of the remedy and subject to the law of the forum."). That rule is firmly established in New York law. *Morris Plan Industrial Bank v. Gunning*, 295 N.Y. 324, 331-32 (1946). The Court of Appeals ruled that for these Louisiana plaintiffs, New York would not extend the benefit of enforcement procedures which are available to all New York citizens as a matter of right.

Inconsistently, however, in affirming an order vacating the docketing of the Louisiana Judgment, the Court of Appeals did not allow that judgement to have the enforcement benefits required by Louisiana law. Under Louisiana law, docketing of a judgment against the State is required. *Holly & Smith Architects, Inc. v. St. Helena Congregate Facility, Inc. and St. Helena Parish Hospital*, 2006 La. LEXIS 3307 (La. 2006). (Louisiana Constitutional limitations on enforcement of judgment do not limit the plaintiff's right to the docketing of a judgment.).

Had docketing been allowed, enforcement would have followed. Article 54 of New York's Civil Practice Law and Rules provides for the automatic registration of a final sister-state judgment. Once registered, a foreign judgment "has the same effect and is subject to the same procedures, defenses and proceedings for reopening, vacating or staying as a judgment of the Supreme Court of [New York] and may be enforced were satisfied in a like manner." C.P.L.R. §5402(b).

Under the Full Faith and Credit Clause, docketing was constitutionally required. The consequences of docketing were to automatically qualify for enforcement. This statutory command was not followed because the Constitutionally required docketing was not allowed. That determination by itself violates the Full Faith and Credit Clause.

By applying enforcement procedures available to out of state judgment creditors in a manner different from what is required for New York citizens had they obtained an identical judgment, the New York Court of Appeal also violated the Privileges and Immunities Clause of Article IV, Section 2 of the United States Constitution.

STATEMENT OF FACTS

A. THE FACTUAL BACKGROUND

On February 17, 2006, the Louisiana Supreme Court denied a petition for a *writ of certiori* sought by the State of Louisiana seeking to review the decision of the Louisiana Court of Appeals in *Boudreaux v. Louisiana*, 924 So. 2d 1018 (La. 2006). The Court of Appeals had unanimously affirmed, with minor corrections, a $91,000,000.00 judgment on behalf of 1,286 claimants who were damaged by a flood in 1983 as a result of the negligence of the State. *Boudreaux v. Louisiana*, 906 So. 2d 695 (La. App. 1st Cir. 2005). That decision ended 23 years of litigation. *See, id..*, 906 So. 2d at 698-99. It was the second time the Louisiana Supreme Court saw the case. On February 26, 2002, the Louisiana Supreme Court had dismissed an earlier petition for a *writ of certiori* seeking reversal of the

appellate decision affirming a judgment on liability.[1] Once the final petition for a writ was denied, the judgment became fully executory.

Because of limitations on the ability to seize property of the State of Louisiana to satisfy a judgment, La. Const. Art. XII, §10(C), App. at 50a, Plaintiffs sought to enforce that judgment here in New York. However, during consultation with the judgment clerk concerning the filing of the judgment pursuant to New York Civil Practice Law and Rules Article 54, *see* App. at 54a, two technical defects in the judgment were recognized. An Order to Show Cause was submitted seeking the technical corrections necessary pursuant to C.P.L.R. §5019.

B. THE SUPREME COURT DECISION

When the case came on to be heard on September 11th, 2006, the New York Supreme Court Justice held that the Louisiana constitutional provision limiting enforcement was binding on the New York Courts. He characterized the application as "waste [of] my time," App. at 46a, and found it to be "frivolous" *id.*

Despite the fact that no stay had been entered by a Louisiana court and unrebutted representations by counsel as well as proffered evidence (which the Court refused to accept) that the Louisiana courts did not consider the Order stayed, the Court "deemed" the Order to be "stayed" because "we have a rule in New York if it walks like a duck, and talks like a duck, it is a duck." App. at 44a. Based on the "deemed" stay, the

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[1] *See, Boudreaux v. Louisiana*, 815 So. 2d 7 (La. 2002) (writ dismissed), 794 So. 2d 804 (La. 2001) (*writ of certiori granted*); 780 So. 2d 1163 (La. App. 1st Cir. 2001) (affirming judgment of liability); 690 So. 2d 114 (La. App. 1st Cir. 1997) (affirming class certification).

Court directed the judgment clerk to "vacate the filing of this judgment against the State of Louisiana . . ." App. at 47a..

C. THE DECISION OF THE APPELLATE DIVISION

By a vote of four to one, a divided panel of the Appellate Division, First Department, affirmed the decision of the IAS Court. The Majority relied on the limitations on enforcement in Article XII Section 10(C) of the Louisiana Constitution of 1974, and Louisiana Revised Statutes §13:1509, App. at 52a, which mirrors the Constitutional standard. The Appellate Division also cited Louisiana case law which held that Louisiana courts cannot issue a writ of mandamus to compel an appropriation to pay a judgment.[2] The Appellate Division Majority reasoned:

> . . . New York is only required to give the Louisiana judgment the same preclusive effect that Louisiana would give under its own law (*Matter of Luna v Dobson*, 97 NY2d 178, 183, 763 N.E.2d 1146, 738 N.Y.S.2d 5 [2001], see also Restatement [Second] of Conflict of Laws §111 ["[a] judgment will not be enforced in other states if the judgment is not subject to enforcement in the state of rendition because the judgment is subject to a

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[2] App. at 15a, *citing The Newman Marchive Partnership, Inc. v. City of Shreveport*, 962 So. 2d 1075, 1077-1078 [La 2007], and *Cooper v. Orleans Parish School Bd.*, 742 So. 2d 55, 64 [La 1999], *writ denied* 751 So. 2d 858 [La 1999]).

condition not yet performed"]).

> In the matter before us, we decline to give the Louisiana judgment any greater effect than it enjoys in Louisiana. Since such judgment does not become "payable" against the State of Louisiana until its legislature deems it so, it, likewise, cannot be enforced in the State of New York.

App. at 11a-12a.

The Appellate Division Majority also concluded that the Louisiana Judgment is not a judgment at all under New York's Article 54, but merely a "contingent award of damages." App. at 14a. The Appellate Division Majority held: "C.P.L.R. 5402 does not contemplate a foreign judgment that is a judgment only nominally, but instead contemplates an actual judgment, *i.e.*, one that is enforceable in the jurisdiction in which it is rendered." *Id.* The Appellate Division Majority looked to the doctrine of comity to "provide further guidance." App. at 12a. It found that "New York has absolutely nothing at stake in this matter, whereas the case implicates, and seeks to circumvent, Louisiana's laws and state Constitution. As a result, we find that this is just such a case where we should defer to the laws of our sister state." App. at 13a.

Justice Catterson filed a dissent, finding that the Majority's argument that the Louisiana Judgment should not be "given greater effect" in New York than in Louisiana was in error because it "conflates two different concepts: the effect of a domestic judgment on state assets versus the ability to enter a foreign judgment pursuant to the Full Faith and Credit

Clause." App. at 19a-20a. The Dissent reasoned that under the Full Faith and Credit Clause, "Enforcement measures do not travel with the sister state judgment . . . ; such measures remain subject to the . . . control of forum law." *Id., citing Baker by Thomas v. GMC*, 522 U.S. 222, 235 (1998). The Dissent also noted that this Court reached a similar result in *Morris Plan Industrial Bank v. Gunning*, 295 N.Y. 324 (1946).

The Dissent found that Article 54 required "immediate recognition," since the requirements of the C.P.L.R. §5402 had been met and no "stay" was in effect.

The Dissent also found it persuasive that "under similar circumstances it appears uncontroverted that Louisiana itself would require docketing under its Enforcement of Foreign Judgments Act, *citing Littleton v. Moss*, 914 So. 2d 51, 55 (La. Ct. App. 2005). App. at 23a.

The Dissent observed that the "public policy of this state requires enforcement of the judgment . . . Surely it is just and equitable for the Plaintiffs, who were injured more than 20 years ago, due to the malfeasance of an agent of the Defendant, to be compensated for their losses." App. at 23a. The Dissent concluded that our "public policy" trumps Louisiana's interest. "If the defendant chooses to do business here, it should not expect treatment other than that accorded by state law in New York." *Id.*.

D. THE DECISION OF THE COURT OF APPEALS

The Court of Appeal affirmed the majority decision of the Appellate Division applying a similar

analysis. The Court held that "what the Full Faith and Credit Clause requires is that a court provide a foreign judgment with the same credit, validity, and effect that it would have in the state that pronounced it." The Court found that the limitations regarding enforcement contained in Article XII, §10(C) of the Louisiana Constitution are a limitation on the "effect" of the judgment. The Court held that New York is not required to enforce a judgment against Louisiana when it could not be enforced in Louisiana absent a legislative appropriation.

In support of its analysis, the Court cited *O'Connell v Corcoran*,1 NY3d 179, 185 (2003) and *Matter of Farmland Dairies v Barber*, 65 NY2d 51 (1985), both of which concerned the *res judicata* effect of the judgments themselves. In *O'Connell*, the issue was whether the plaintiff, who had received a Vermont divorce, could on the basis of that decree proceed in New York to obtain an order of equitable distribution. The *O'Connell* court determined that under Vermont law *res judicata* would bar litigation of property distribution claims which could have been, but were not, litigated in the Vermont action. Accordingly, the *O'Connell* court held that the equitable distribution claims could not be litigated in New York.

In *Farmland Dairies*, the petitioner was convicted of price rigging in New Jersey while an application to extend its milk dealers' license was pending in New York. The New Jersey judgment contained a condition providing that the judgment could not be used for evidential purposes in any civil proceeding.

The New York Commissioner of Agriculture and Markets in New York used the New Jersey judgment as

conclusive proof of price rigging and denied petitioner's application for a New York license. The *Farmland Dairies* court concluded that the full faith and credit clause required recognition of the condition in the New Jersey judgment. Accordingly, it violated the Full Faith and Credit Clause to use that judgment for evidential purposes in the New York administrative proceeding.

On the basis of those two cases alone, and without any discussion of the precedents of this Court, the Court of Appeals concluded that the Full Faith and Credit Clause does not require enforcement of the Louisiana judgment.

The Court of Appeals then proceeded to discuss whether enforcement was required by the doctrine of "comity." The Court of Appeals concluded:

> We agree with the Appellate Division that there is no compelling interest in providing New York as a forum for redress in this case. Indeed, the flood that caused the damage suffered by plaintiffs occurred in Louisiana and all litigation that arose from the flood was brought in Louisiana. The rights of New Yorkers are not involved in this matter at all.

The Court of Appeals concluded that it was "wise policy" to respect Louisiana's limitation on enforcement, citing this Court's dicta in *Nevada v Hall*, 440 US 410, 426 (1979).

THE REASONS FOR GRANTING THE WRIT

1. Under the Full Faith and Credit Clause, the Louisiana Judgment is Final and is Required to Be Filed and Enforced in Accordance with New York Law

This Court has held numerous times, the requirement of recognition of final judgments set forth in the Full Faith and Credit Clause are "exacting, if not inexorable." As this Court held over half a century ago:

> The Full Faith and Credit Clause is not to be applied, accordion-like, to accommodate our personal predilections. It substituted a command for the earlier principles of comity and thus basically altered the status of the States as independent sovereigns. *Williams v. North Carolina*, 317 U.S. 287, 301-302; *Sherrer v. Sherrer, supra*. It ordered submission by one State even to hostile policies reflected in the judgment of another State, because the practical operation of the federal system, which the Constitution designed, demanded it. . . . [T]he requirements of full faith and credit, so far as judgments are concerned, are exacting, if not inexorable (*Sherrer v. Sherrer, supra*) . . .

Estin v. Estin, 334 U.S. 541, 545-546 (1948) (footnote omitted).

Distinguishing recognition required of final judgments from the less exacting requirement to give recognition to sister state laws, this Court more recently reiterated the long-standing rule:

> Regarding judgments, however, the full faith and credit obligation is exacting. A final judgment in one State, if rendered by a court with adjudicatory authority over the subject matter and persons governed by the judgment, qualifies for recognition throughout the land.

Baker by Thomas v. GMC, 522 U.S. 222, 232-233 (U.S. 1998). *Accord, Franchise Tax Bd. v. Hyatt*, 538 U.S. 488, 494 (U.S. 2003); *Durfee v. Duke*, 375 U.S. 106, 109 (1963) (where judgment issuing court determined it had jurisdiction, that determination is *res judicata* and entitled to full faith and credit); *Underwriters National Assurance Co. v. North Carolina Life & Accident and Health Insurance Guaranty Assoc.*, 455 U.S. 691 (1982) (same).

Indeed, in prior decisions, New York had followed the same rule. In *Farmland Dairies v. Barber*, 65 N.Y.2d 51 (N.Y. 1985), the New York Court of Appeals distinguished choice of law determinations where consideration of state contacts and interests are permissible from enforcement of judgments where such considerations play no role. The Court of Appeals then held:

> This case concerns a judgment, however, and the States enjoy no . . . flexibility in deciding whether they will recognize foreign judgments.

Id. at 58.

In this case, however, the New York Court of Appeals refused to enforce a final Louisiana Judgment concluding that limitations on the manner of

enforcement of the judgment contained in the Louisiana Constitution limited the "effect" of the judgment. The Court of Appeals reasoned that under the Full Faith and Credit Clause, New York is only required to give the Louisiana Judgment the same "effect" as it would have in Louisiana.

The Court of Appeals held:

> In seeking to enforce the Louisiana judgment in New York, plaintiffs attempt to circumvent Louisiana's clear mandate that no judgment rendered against it shall be paid unless its Legislature appropriates funds. Plaintiffs argue that the Full Faith and Credit Clause requires that the Louisiana judgment be enforced in accordance with New York law. As we noted in *O'Connell v Corcoran* (1 NY3d 179, 185 [2003]), however, what the Full Faith and Credit Clause requires is that a court provide a foreign judgment with the same credit, validity, and effect that it would have in the state that pronounced it.

App. at 4a-5a (footnote omitted).

This analysis misapplied settled law under the Full Faith and Credit Clause. To begin with, while the cases do refer to giving a judgment the "same effect" as in the state in which it was rendered, "same effect" means the "same preclusive effect," not the same effect from enforcement proceedings. As this Court held in *Durfee v. Duke*, 375 U.S. 106 (1963).

> Full faith and credit thus generally requires every State to give to a judgment at least the *res judicata* effect which the judgment would be accorded in the State which rendered it. 'By the Constitutional provision for full faith and credit, the local doctrines of *res judicata*, speaking generally, become a part of national jurisprudence . .

Id. at 109.

More recently, this Court made the same point forcefully in *Baker by Thomas.* The Court explained:

> For claim and issue preclusion (*res judicata*) purposes, in other words, the judgment of the rendering State gains nationwide force. *See, e.g., Matsushita Elec. Industrial Co. v. Epstein*, 516 U.S. 367, 373, 134 L. Ed. 2d 6, 116 S. Ct. 873 (1996); *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 485, 72 L. Ed. 2d 262, 102 S. Ct. 1883 (1982); see also Reese & Johnson, The Scope of Full Faith and Credit to Judgments, 49 Colum. L. Rev. 153 (1949).

Baker by. Thomas v. GMC, 522 U.S. 222, 232-233 (U.S. 1998) (footnote omitted). Indeed, the principal has been recognized by the New York Court of Appeal itself. *Luna v. Dobson*, 92 N.Y.2d 178, 183 (2001).

It is indisputable that under Louisiana law the Louisiana Judgment is a final judgment entitled to full res judicata effect. The Louisiana Code of Civil Procedure Article 1841 titled "Judgments, interlocutory and final" provides:

> A judgment is the determination of the rights of the parties in an action and may award any relief to which the parties are entitled. It may be interlocutory or final.
>
> A judgment that does not determine the merits but only preliminary matters in the course of the action is an interlocutory judgment.
>
> A judgment that determines the merits in whole or in part is a final judgment.

La. C.C.P. Art. 1841.

The Louisiana Supreme Court held, in *Avenue Plaza, L.L.C. v. Falgoust*, 676 So. 2d 1077, 1079 (La. 1996):

> A judgment determining the merits of a case is a final judgment. La. C.C.P. art. 1841. *See also, Tolis v. Board of Sup'rs of Louisiana State University*, 95-1529 (La. 10/16/95); 660 So. 2d 1206. A valid and final judgment is conclusive between the same parties, except on appeal or other direct review. LSA-R.S. 13:4231. If a certiorari application is filed, the court of appeal judgment becomes final and definitive when the supreme court denies the application for certiorari. La. C.C.P. art. 2166D.

Id. at 1079. *See, also, Burguieres v. Pollingue*, 843 So. 2d 1049, 1053 (La. Feb. 25, 2003) ("a final judgment is one that disposes of the merits"); *Levert v. Univ. of Ill. at Urbana/Champaign*, 857 So. 2d 611, 616 (La.App. 1 Cir. Sept. 26, 2003) ("A judgment that determines all of

the relief prayed for is a final judgment."). Once the judgment is final, "no court has jurisdiction to change the judgment. . .". *Avenue Plaza, L.L.C. v. Falgoust*, 676 So. 2d at 1079.

Nor can it be argued that this judgment against the State is subject to different rules because of the doctrine of sovereign immunity. Louisiana has, by its 1974 Constitution, waived sovereign immunity. Article XII, Section 10(A) provides: "*No Immunity in Contract and Tort.* – Neither the state, a state agency, nor a political subdivision shall be immune from suit and liability in contract or for injury to person or property." App. at 50a. The Louisiana Supreme Court has characterized this as an "unequivocal constitutional rejection of the doctrine of sovereign immunity." *Jones v. Baton Rouge-Parish of East Baton Rouge*, 388 So. 2d 737, 740 (La. 1980) (rejecting the argument that municipalities should be exempt from strict liability generally applicable under Louisiana Civil Code article 2317).

That is not to say that the constitutional waiver of sovereign immunity effected a change in Louisiana law. At the time the 1974 Constitution was adopted, Louisiana had no sovereign immunity. *See, The Newman Marchive Partnership v. Shreveport*, 979 So.2d 1262, 1266, n.1. (La. 2008). The doctrine of sovereign immunity had no basis in the earlier Constitutions of the state, but instead limited instances of sovereign immunity had been created by the courts. *Board of Commissioners of the Port of New Orleans v. Splendour Shipping & Enterprises Company, Inc.*, 273 So. 2d 19 (La. 1973). Nor would New York recognize Louisiana's claim of sovereign immunity in its courts. *See, Nevada v. Hall*, 440 U.S. 410 (1979); *Ehrlich-Bober & Co., Inc. v. University of Houston*, 49 N.Y.2d 574

(1980); *Deutsche Bank Sec., Inc. v. Montana Bd. of Investments*, 7 N.Y.3d 65, 72 (2006) (states do not have immunity from suit in the courts of other states)

Further, as Justice Blackmun observed in his dissent in *Nevada v. Hall*, 440 U.S. 410 (1979) if sovereign immunity does not exist, "what we have always thought of as a 'sovereign state' is now to be treated in the courts of a sister state once jurisdiction is obtained, just as any other litigant." Id. at 427. (Blackmun, J. dissenting) That result, he reasoned, necessarily meant that enforcement of judgments against a state may be obtained in a sister state in accordance with the enforcing forum's laws. *Id.* at 429-30.

Further, Louisiana law holds that Article XII, Section 10(C) and Louisiana Revised Statute 13:5109(B)(2) only regulates the method of payment of a judgment and do not limit the court's authority. As the Louisiana Court of Appeal recently held:

> With regard to enforcement of judgments rendered against the State, we recognize that LSA-Const. art. XII, § 10(C) governs and limits a private citizen's ability to collect a judgment against the State. . . . It is not aimed at limiting the courts in a general manner in dealing with the [S]tate." Lee Hargrave, "Statutory" and "Hortatory" Provisions of the Louisiana Constitution of 1974, 43 La. Law Rev. 647, 655 (1983) (emphasis added). We further observe that this constitutional scheme for payment of judgments against the State was not designed to allow the paying authority to challenge before the

> legislature the legal correctness of sums provided for in a final and definitive judgment of the courts of this state. To hold otherwise would render judgments against the State meaningless.

Batson v. S. La. Med. Ctr., 965 So. 2d 890, 897 (La.App. 1 Cir. 2007) (footnote omitted) (emphasis supplied). Accord, *Holly & Smith Architects, Inc. v. St. Helena Congreate Facility, Inc. and St. Helena Parish Hospital*, 943 So. 2d 1037, 1045-46 (La. 2006) (Art. XII, §10(C) and La. Rev. Stat. 13:5109(B)(2) govern "method of payment" only).

The Louisiana Judgment was entered by a Louisiana State Court and affirmed by the Louisiana Court of Appeals. A *writ of certiori* was denied by Louisiana's Supreme Court. It is a final determination of the rights of the parties. As a matter of law, it is a final judgment.

The law is similarly long settled that in enforcing a sister-state judgment, the enforcement forum courts will apply its own rules on exemption of property from execution. As Mr. Justice Cardozo stated in *Clark v. Williard*, 294 U.S. 211 (1935) "Every state has jurisdiction to determine for itself the liability of property within its territorial limits to seizure and sale under the process of its courts . . .". *Id.* at 213. "[E]xemption laws are . . . part of the remedy and subject to the law of the forum." *Chicago, R.I. & Pac. Ry. Co. v. Sturm*, 174 U.S. 710, 717-718 (1899) (citations omitted).

The Supreme Court restated this long-standing principle in *Baker by Thomas v. GMC*, 522 U.S. 222 (1998):

> Full faith and credit, however, does not mean that States must adopt the practices of other States regarding the time, manner, and mechanisms for enforcing judgments. Enforcement measures do not travel with the sister state judgment as preclusive effects do; such measures remain subject to the even-handed control of forum law. *See, McElmoyle ex rel. Bailey v. Cohen*, 13 Peters 312, 325 (1839) (judgment may be enforced only as "laws [of enforcing forum] may permit"); *see also* Restatement (Second) of Conflict of Laws § 99 (1969) ("The local law of the forum determines the methods by which a judgment of another state is enforced."). *Id.* at 235. (emphasis supplied) (footnote omitted).

The rule that methods and means of enforcement are governed by the law of the forum is widely applied

by state courts,[3] including most notably, the courts of Louisiana.[4]

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[3] *E.g., Dressler v. Bowling*, 24 Ohio St. 3d 14, 16-17 (Ohio 1986); *Philadelphia v. Bauer*, 97 N.H. 372, 382 (1984); *People ex rel Hoagland v. Streeper*, 12 Ill. 2d. 204, 212-13 (Ill. 1957); *Bolton v. Pennsylvania Co.*, 88 Penn. St. 261 (1879) ("The laws for process of attachment and execution are part of the remedy, governed entirely by the *lex fori*."); *Caddie Homes, Inc. v. Falic*, 211 Pa. Super. 333, 334-335 (Pa. Super. Ct. 1967) ("[I]t has long been the general rule in Pennsylvania and elsewhere that the laws of attachment and exemption are governed by the law of the forum, not the law of the state where the debt arose."); *Tiber Holding Corp. v. DiLoreto*, 2001 Conn. Super. LEXIS 3552, 2-3 (Conn. Super. Ct. 2001) ("the Pennsylvania exemption has no effect in Connecticut because the garnishment laws of Connecticut apply."); *Consumers United Ins. Co. v. Smith*, 644 A.2d 1328, 1348 (D.C. 1994) ("District of Columbia must . . . accord that foreign receiver the same rights and privileges against judgment creditors, seeking to levy against assets in the District of Columbia, that the District would accord the same kind of receiver if appointed locally in the District of Columbia"). The Restatement of Conflict of Laws clearly recognizes that the "same effect" principle has no application to the issue of enforcement methods or limitations. Section 99 of the Restatement of Conflict of Laws 2d (1971) (cited with approval by the Supreme Court in *Baker by Thomas*, 522 U.S.at 235) expressly states: "The local law of the forum determines the methods by which a judgment of another state is enforced."

[4] Louisiana has adopted the Uniform Enforcement of Foreign Judgments Act. La. R.S. 13:4241 *et. seq.* In *Canizaro Trigiani Architects v. Crowe*, 815 So. 2d 386 (La. App. 2d Cir. 2002), a Mississippi judgment against the defendant was filed in Louisiana pursuant to its enforcement of foreign judgment act The plaintiff sought enforcement of the registered judgment in Louisiana after its enforcement in Mississippi was barred by the expiration of Mississippi's seven-year statute of limitations on judgments.

The Louisiana Court of Appeals allowed execution to proceed even though the judgment was unenforceable in the state where first rendered. The court held:

Significantly, this widely accepted rule is the law of New York. In *Morris Plan Industrial Bank v. Gunning*, 295 N.Y. 324, 331-32 (1946), this Court applied that principle to allow enforcement in New York which was unavailable in the state where a judgment was originally rendered. The plaintiff in *Morris Plan* was a New York corporation holding an unsatisfied Pennsylvania judgment against Gunning, a defendant who lived and worked in Pennsylvania. Plaintiff commenced an action in New York seeking an attachment on wages earned by defendant in Pennsylvania from a third party, the Pennsylvania Railroad Company, a common carrier doing business in New York. Under a century-old law reflecting deeply-held state policy, Pennsylvania law provided a complete exemption of wages from attachment or garnishment. By contrast, New York law allowed the garnishment of wages to the extent of 10% of the wage.

The Court of Appeals had no problem in holding that New York law – not the law of Pennsylvania – applied to the determination of whether there should be

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> Therefore, the procedure for enforcement of a foreign judgment under the EFJA results in a new Louisiana judgment just as it would if the procedure under La. C.C.P. art. 2541 were followed. As the court noted in *Home Port*, we cannot read the phrase in La. R.S. 13:4242, "the foreign judgment shall be treated in the same manner as a judgment of a court of this state," to have any other meaning. Accordingly, in the present case, the time for seeking revival of the judgments is determined by the date the judgments were made executory in Louisiana, July 15, 1991.

Id. at 392.

an attachment or garnishment of Gunning's wages, which was effectuated in New York. It denied Plaintiffs' request for vacatur holding:

> The New York garnishment statutes are applicable to wages earned outside the State (*Feinman v. Marks, supra; Morris Plan Co. v. Miller, supra*). Some cases in other States hold that, under rules of comity, the courts of one State will not permit garnishment of wages earned in another State where the laws of that other State prohibit garnishment (*see Drake v. L.S. & M.S. Ry. Co.*, 69 Mich. 168). However, no New York authority to that effect is found and such a holding would be inconsistent with *Feinman v. Marks (supra)*. We must reach a decision here not on any rules of comity, but by construing our own statutes. The general rule is that questions of garnishment and attachment are decided by the law of the forum since they deal with remedies (3 Beale on Conflict of Laws, pp. 1604, 1605; Restatement of Conflict of Laws, § 590, also § 600; *see Chicago, Rock Island &c. Railway v. Sturm*, 174 U.S. 710, 717, 718). Therefore, the Pennsylvania law forbidding garnishment of wages has no effect in New York, although the wages attached were earned in Pennsylvania.

Morris Plan Industrial Bank v. Gunning, 295 N.Y. 324, 331-332 (N.Y. 1946). *See also, Downs v. American Mut. Liability Inc. Co.*, 19 A.D.2d 376, 383 (1st Dep't

1963). *People's Nat'l Bank v. Hitchcock*, 104 Misc. 2d 647, 649 (Sup. Ct. N.Y. Cty. 1980),, *In re Estate of Horton*, 91 Misc. 2d 885 (Surr. Ct. Cattaraugus 1977); *Foley v. Equitable Life Assurance Soc.*, 173 Misc. 1031, 1033 (Sup. Ct. N.Y. Cty. 1940).

Finally, this Court has emphatically rejected any notion one state could deny enforcement of another state's final judgment based on "public policy." As this Court held in *Baker*:

> "[O]ur decisions support no roving "public policy exception" to the full faith and credit due *judgments*. *See Estin*, 334 U.S. at 546 (Full Faith and Credit Clause "ordered submission . . . even to hostile policies reflected in the judgment of another State, because the practical operation of the federal system, which the Constitution designed, demanded it."); *Fauntleroy v. Lum*, 210 U.S. 230, 237, 52 L. Ed. 1039, 28 S. Ct. 641 (1908) (judgment of Missouri court entitled to full faith and credit in Mississippi even if Missouri judgment rested on a misapprehension of Mississippi law)."

Id. at 233-234 (1998) (emphasis in the original).

Such evaluations may be appropriate when deciding choice of law issues, *see Nevada v. Hall*, 440 U.S. 410, 426 (1979), but not when enforcing final judgments. For all of these reasons, there is no basis under Full Faith and Credit Law, Louisiana Law or under New York's own laws on enforcement of foreign judgments to deny recognition of the Louisiana Judgement.

2. Denying Enforcement of the Louisiana Judgment in Favor of Louisiana Citizens Denies the Petitioners the Privileges and Immunities Guaranteed to New York Citizens

The fact that the Louisiana judgment against the state of Louisiana was entered on behalf of citizens of Louisiana, rather than citizens of New York, was cited by the Court of Appeals as supporting its decision to deny enforcement. The Court of Appeals held that there is "no compelling interest in providing New York as a forum for redress in this case." "The rights of New Yorkers are not involved in this matter at all." *See*, App. at 6a.

However, New York may not constitutionally close the doors of its courts to out of state citizens when they are freely open to citizens of New York. New York may not constitutionally deny enforcement of a judgment held by Louisiana citizens, when its statutes guarantee enforcement such judgments if held by New York citizens. Such acts transgress the Privileges and Immunities Clause of the United States Constitution. U.S. Constitution, Article IV Section 2.

The Privileges and Immunities Clause provides that "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

The object of the Privileges and Immunities Clause is to "place[ ] the citizens of each State upon the same footing with the citizens of other States, so far as the advantages resulting from citizenship in those States are concerned." *Lunding v. New York Tax Appeals Tribunal*, 522 U.S. 287, 296 (U.S. 1998) *citing*,

Paul v. Virginia, 75 U.S. 168, 8 Wall. 168, 180, 19 L. Ed. 357 (1869).

As this Court held over a century ago in *Chambers v. Baltimore & O. R. Co.*, 207 U.S. 142 (1907):

> [S]ubject to the restrictions of the Federal Constitution, the State may determine the limits of the jurisdiction of its courts, and the character of the controversies which shall be heard in them. The state policy decides whether and to what extent the State will entertain in its courts transitory actions, where the causes of action have arisen in other jurisdictions. Different States may have different policies and the same State may have different policies at different times. But any policy the State may choose to adopt must operate in the same way on its own citizens and those of other States. The privileges which it affords to one class it must afford to the other.

Id.. at 148-149.

In *Chambers*, an Ohio statute provided for an action for a death occurring in another state, but only when the death was of a citizen of Ohio. Ohio common law prohibited such an action regardless of the citizenship of the decedent. This Court held that the Ohio statute discriminated against non-citizens and thus violated the Privileges and Immunities Clause.

While the cases in this Court which have turned on that principal have been few and far between, the

principal announced by the Court has been repeatedly re-affirmed. *See, e.g., Missouri P. R. Co. v. Clarendon Boat Oar Co.*, 257 U.S. 533, 535 (U.S. 1922) ("Under §2 of Article IV of the Federal Constitution, the citizens of each State are entitled to all privileges and immunities of citizens in the several States. This secures citizens of one State the right to resort to the courts of another, equally with the citizens of the latter State"); *McKnett v. St. Louis & S. F. R. Co.*, 292 U.S. 230, 233 (U.S. 1934) (Brandeis, J.) ("The power of a State to determine the limits of the jurisdiction of its courts and the character of the controversies which shall be heard in them is, of course, subject to the restrictions imposed by the Federal Constitution. The Privileges and Immunities clause requires a state to accord to citizens of other states substantially the same right of access to its courts as it accords to its own citizens").

Decisions from the highest court in several states re-affirm the general principle that a state must provide the same access to its courts for non-citizens as it does for its citizens. In the recent case of *Morris v. Crown Equip. Corp.*, 219 W. Va. 347 (2006), *cert. denied, Crown Equip. Corp. v. Morris*, 127 S. Ct. 835 (2006), the West Virginia Supreme Court invalidated a law which denied the right to bring a products liability lawsuit in West Virginia against a West Virginia corporation and an out-of-state corporation where the plaintiff was a resident of another state. The court held:

> Among the privileges and immunities of citizenship is included the right of access to courts for the purpose of bringing and maintaining actions. This privilege includes the right to employ the usual remedies for the enforcement of personal rights in actions of every kind. While a

> state may decide whether and to what extent its courts will entertain particular causes, any policy the state may choose to adopt must operate in the same way upon citizens of other states as upon its own, and the privileges it affords to the latter class it must afford to the same extent to the other, but not to any greater extent. (Footnotes omitted, emphasis added.)

Id., quoting Privileges and Immunities Clause, Am. Jur. 2d, Constitutional Law, Sec. 769 (2006). *See also, Gober v. Federal Life Ins. Co.*, 255 Mich. 20, 24, 237 N.W. 32, 33 (1931) (applying the Privileges and Immunities Clause) ("If defendant were a domestic corporation, there would be no doubt of plaintiff's right to sue in this State on her cause of action.").

The decision of the New York Court of Appeals makes clear, as do the prior decisions of that court and the statutory command of C.P.L.R Article 54, that for New York citizens, New York would enforce a judgment against Louisiana irrespective of the acts or inaction of the Louisiana legislature in appropriating funds for the payment of that judgment. It is also clear that enforcement was denied in this case solely because of the citizenship of the petitioners. To deny enforcement of a final judgment on the basis of the citizenship of the plaintiff is a clear violation of the Privileges and Immunities Clause and cannot stand.

CONCLUSION

For all of the above reasons, each of which is independently sufficient, petitioner respectfully requests that this Court issue a writ of certiorari.

Dated: New York, New York
March 27, 2009

Respectfully Submitted,

MAX FOLKENFLIK
Counsel of Record
FOLKENFLIK & MCGERITY
1500 Broadway, 21st Floor
New York, New York 10036
(212) 757-0400
Attorneys for Petitioner

APPENDIX

COURT OF APPEALS OF NEW YORK

No. 182
October 28, 2008, Decided

JEAN BOUDREAUX, *et al.*,
Appellants,

—v.—

THE STATE OF LOUISIANA,
DEPARTMENT OF TRANSPORTATION, *et al.*,
Respondents.

Max Folkenflik, *for appellants*.
Michael Stolper, *for respondents*.

Opinion by Judge Ciparick. Chief Judge Kaye and Judges Graffeo, Read, Smith, Pigott and Jones concur.

CIPARICK, J.:

This appeal calls upon us to determine whether the Full Faith and Credit Clause of the United States Constitution and the doctrine of comity require New York courts to enforce a money judgment against the State of Louisiana Department of Transportation (DOT) when such judgment is unenforceable in Louisiana due to constitutional and statutory limitations. We conclude that New York courts are not required to enforce such a money judgment.

In April 1983, flood waters damaged a large number of homes and businesses in Tangipahoa Parish, Louisiana. Plaintiffs Jean Boudreaux and other victims of the flood commenced a class action[1] against the State of Louisiana and various other defendants alleging that the Louisiana DOT disrupted the Tangipahoa River's natural flood plain by negligently constructing the Interstate 12 bridge, thereby causing backwater to submerge plaintiffs' surrounding homes and properties. After prevailing on the issue of liability and exhausting several appeals, plaintiffs were awarded $91,846,957.04 in damages, plus interest from April 10, 1984. Although plaintiffs have docketed the judgment in 18 Louisiana parishes, they have not been able to recover any portion of the judgment.

In August 2006, plaintiffs attempted to docket the judgment in New York County pursuant to CPLR Article 54 so they might reach any assets owned by the State of Louisiana located within the State of New York. A clerk of Supreme Court declined to accept the filing of the judgment, citing two tech-

[1] There are 1,286 plaintiffs within the class.

nical defects.[2] Plaintiffs then moved for leave to correct the deficiencies, which Supreme Court orally denied. The Appellate Division, with one Justice dissenting, affirmed, holding that since plaintiffs' judgment does not become " 'payable' " against the State of Louisiana until its legislature appropriates the necessary monies to pay the judgment it cannot be enforced in the State of New York, and that as a matter of comity, New York State courts should defer to the laws of Louisiana. The dissent concluded that public policy requires enforcement of the judgment. Plaintiffs appealed as of right on constitutional grounds and we now affirm.

Plaintiffs argue that Louisiana waived sovereign immunity in Article XII, § 10(A) of its Constitution.[3] Plaintiffs acknowledge, however, that there are constitutional and statutory limitations on a judgment creditor's ability to seize property of the State of Louisiana to satisfy a judgment. Indeed, article XII, § 10(C) of the Louisiana Constitution provides that:

> "[n]o judgment against the state, a state agency, or a political subdivision shall be exigible, payable, or paid except from funds appropriated therefor by the legislature or by the political

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[2] The clerk informed plaintiffs' counsel that: (1) the portions of the judgment which were in favor of the class required a named judgment creditor or the name and office address of the attorney for the judgment creditor (*see* CPLR 5018[c][1][ii], [vii]) and (2) the clerk could not compute and enter prejudgment interest on a non-New York judgment.

[3] The section provides: "No Immunity in Contract and Tort. Neither the state, a state agency, nor a political subdivision shall be immune from suit and liability in contract or for injury to person or property."

> subdivision against which the judgment is rendered."

Further, the Louisiana Revised Statutes, § 13:5109(B)(2) requires that:

> "[a]ny judgment rendered in any suit filed against the state, a state agency, or a political subdivision, or any compromise reached in favor of the plaintiff or plaintiffs in any such suit shall be exigible, payable, and paid only out of funds appropriated for that purpose by the legislature, if the suit was filed against the state or a state agency, or out of funds appropriated for that purpose by the named political subdivision, if the suit was filed against a political division."

In seeking to enforce the Louisiana judgment in New York, plaintiffs attempt to circumvent Louisiana's clear mandate that no judgment rendered against it shall be paid unless its Legislature appropriates funds. Plaintiffs argue that the Full Faith and Credit Clause[4] requires that the Louisiana judgment be enforced in accordance with New York law. As we noted in *O'Connell v Corcoran* (1 NY3d 179, 185, 802 N.E.2d 1071, 770 N.Y.S.2d 673 [2003]), however, what the Full Faith and Credit Clause requires is that a court provide a foreign judgment with the same credit, validity, and effect that it would have in the

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[4] Article IV, § 1 of the United States Constitution requires that: "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."

state that pronounced it. Certainly, Louisiana courts are aware that a judgment creditor can be left without a remedy when its legislature refuses to appropriate the funds necessary to satisfy a judgment, as is the case here. In *Newman Marchive P'ship v City of Shreveport* (979 So2d 1262 [La 2008]) the Louisiana Supreme Court stated that:

> "We recognize, as have courts before us, that our holding today effectively provides [a plaintiff] a right without a remedy. . . However, as the judicial branch, like all branches, derives its power from the constitution, we are bound to accept the limitations placed upon us by that document. Although article V, section 1 grants our branch the judicial power—a power which would seemingly carry with it the inherent ability to enforce judgments—the constitution otherwise limits that power when judgments are rendered against the state and its political subdivisions, and places enforcement of such judgments in the legislature."

(*id.* at 1270 [internal quotations and citations omitted]). Thus, what plaintiffs seek is for the courts of New York to enforce a judgment that cannot be enforced in Louisiana. As we stated in *Matter of Farmland Dairies v Barber* (65 NY2d 51, 478 N.E.2d 1314, 489 N.Y.S.2d 713 [1985]), the Full Faith and Credit Clause requires "that the public acts, records and judicial proceedings of each State shall be given full faith and credit in every other State. The doctrine does not make a foreign State judgment a judgment in the forum State. Before that occurs and a locus remedy may be obtained, an action must be brought and a judgment entered on the foreign judg-

ment in the forum State. . . [I]f the foreign court had jurisdiction. . . the courts of every other State must give it the same credit, validity and effect as it has in the State which rendered it. . ." (*id.* at 55 [internal citations omitted]).

Contrary to plaintiffs assertion, we conclude that neither the full Faith and Credit Clause nor CPLR Article 54 requires the enforcement of the Louisiana judgment in New York State.

Nor is it required as a matter of comity. In applying the doctrine of comity, we defer to the Constitution of Louisiana and the public policy embodied within the statute enacted by its legislature. As we stated in *Ehrlich-Bober & Co. v University of Houston* (49 NY2d 574, 404 N.E.2d 726, 427 N.Y.S.2d 604 [1980]) comity is not a rule of law, but a voluntary decision by one state to defer to the policy of another, especially "in the face of a strong assertion of interest by the other jurisdiction" (*id.* at 580).

Louisiana has expressed its public policy and its own courts have recognized its validity. We agree with the Appellate Division that there is no compelling interest in providing New York as a forum for redress in this case. Indeed, the flood that caused the damage suffered by plaintiffs occurred in Louisiana and all litigation that arose from the flood was brought in Louisiana. The rights of New Yorkers are not involved in this matter at all. Based upon the facts of this case, it is clear that the "wise policy [is] . . . to respect [Louisiana's] established limits on liability" (*Nevada v Hall*, 440 U.S. 410, 426, 99 S. Ct. 1182, 59 L. Ed. 2d 416 [1979]).

Accordingly, the order of the Appellate Division should be affirmed, with costs.

* * * *

Order affirmed, with costs. Opinion by Judge Ciparick. Chief Judge Kaye and Judges Graffeo, Read, Smith, Pigott and Jones concur.

Decided October 28, 2008

SUPREME COURT OF NEW YORK
APPELLATE DIVISION, FIRST DEPARTMENT

111287/06, 247
January 24, 2008, Decided
January 24, 2008, Entered

JEAN BOUDREAUX, *et al.*,

Plaintiffs-Appellants,

—v.—

THE STATE OF LOUISIANA,
DEPARTMENT OF TRANSPORTATION, *et al.*,

Defendants-Respondents.

Folkenflik & McGerity, New York (Max Folkenflik of counsel), *for appellants.*

Orrick, Herrington & Sutcliffe LLP, New York (Michael Stolper and Caroline S. Nolan of counsel), *for respondents.*

Eugene Nardelli, *J.P.*, Milton L. Williams, John T. Buckley, James M. Catterson, James M. McGuire, *JJ.* All concur except Catterson, *J.* who dissents in an Opinion.

Plaintiffs appeal from an order of the Supreme Court, New York County (Charles E. Ramos, J.), entered September 18, 2006, which denied their motion for leave to make two technical changes in a Louisiana judgment so that it could be docketed in New York, and vacated the filing of that judgment.

NARDELLI, J.P.

In this appeal, we are called upon to review Supreme Court's vacatur of the filing of a Louisiana judgment by plaintiffs, members of a class who were victims of a devastating flood which occurred in April 1983.

The facts underlying this matter, and out of which the Louisiana judgment arose, are not in dispute.

On April 6 through 9, 1983, flood waters damaged a large number of homes and businesses in Tangipahoa Parish, Louisiana. Plaintiff Jean Boudreaux and "the victims of the flood on April 6, 1983" (*see Boudreaux v State of Louisiana*, 906 So2d 695 [La 2005], *writ denied* 924 So2d 1018 [La 2006]) brought a class action, approximately one year later, against various defendants, including the State of Louisiana. Plaintiffs alleged that the Louisiana Department of Transportation designed and built the Interstate 12 bridge over the Tangipahoa River in such a negligent and improper manner that it disrupted the natural flood plain, resulting in the flooding of their homes and properties. Plaintiffs prevailed on the issue of liability (*Boudreaux v State of Louisiana*, 780 So2d 1163 [La 2001], *writ dismissed* 815 So2d 7 [La 2002]) and, after numerous appeals, were awarded

$91,846,957.04 in damages, plus interest from April 10, 1984. Plaintiffs now seek to file, and enforce, the Louisiana judgment in New York.

The State of Louisiana, pursuant to its Constitution, has waived sovereign immunity (La Const, art XII, § 10[A]). That waiver, however, is subject to certain limitations. Article XII, (§ 10[C]) of the Louisiana Constitution provides, in pertinent part, that:

> "[n]o judgment against the state, a state agency, or a political subdivision shall be exigible, payable or paid except from funds appropriated therefor by the legislature or by the political subdivision against which the judgment is rendered."

Louisiana Revised Statutes, section 13:5109 states:

> "(B)(2) *Any judgment* rendered in *any suit* filed against the state, a state agency, or a political subdivision, or any compromise reached in favor of *the plaintiff or plaintiffs in any such suit shall be exigible, payable, and paid only* out of funds appropriated for that purpose by the legislature, if the suit was filed against the state or a state agency, or *out of funds appropriated for that purpose by the named political subdivision, if the suit was filed against a political division.*" (Emphasis added).

The Court of Appeals of Louisiana, Second Circuit, recently opined that "[a] judgment creditor of a political subdivision of the state has no way to collect its judgment except by appropriation . . . Appropriation of funds is discretionary and not ministerial, and mandamus will not lie to compel pay-

ment of a judgment by a political subdivision" (*The Newman Marchive Partnership, Inc. v City of Shreveport*, 962 So2d 1075, 1077-1078 [La 2007], *see also Cooper v Orleans Parish School Bd.*, 742 So2d 55, 64 [La 1999], *writ denied* 751 So2d 858 [La 1999]).

Plaintiffs herein have registered their judgment in 18 Louisiana parishes but, to date, the Louisiana Legislature has declined to appropriate the funds necessary to pay that judgment. As a result, plaintiffs now seek, in our view, to do an end run around their own legislature, and the laws of their home state, by attempting to enforce the judgment in the New York courts.

The Full Faith and Credit Clause of the United States Constitution states that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial proceedings of every other State . . ." (US Const art IV, § 1). Its purpose is to avoid conflicts between the states in adjudicating the same matters, and functions to "weld the independent States into a Nation" (*Matter of Farmland Dairies v Barber*, 65 NY2d 51, 55, 478 N.E.2d 1314, 489 N.Y.S.2d 713 [1985]). In accordance therewith, a "judgment of a state court should have the same credit, validity, *and effect*, in every other court of the United States, which it had in the state where it was pronounced' " (emphasis added) (*O'Connell v Corcoran*, 1 NY3d 179, 184, 802 N.E.2d 1071, 770 N.Y.S.2d 673 [2003], quoting *Hampton v McConnel*, 3 Wheat [16 U.S.] 234, 235, 4 L. Ed. 378 [1818]; *see also A.J. Pegno Constr. Corp./Tully Constr. Co., Inc. v Highlands Ins. Co.*, 39 AD3d 273, 274, 834 N.Y.S.2d 109 [2007]). Thus, New York is only required to give the Louisiana judgment the same

preclusive effect that Louisiana would give under its own law (*Matter of Luna v Dobson*, 97 NY2d 178, 183, 763 N.E.2d 1146, 738 N.Y.S.2d 5 [2001], *see also* Restatement [Second] of Conflict of Laws § 111 ["[a] judgment will not be enforced in other states if the judgment is not subject to enforcement in the state of rendition because the judgment is subject to a condition not yet performed"]).

In the matter before us, we decline to give the Louisiana judgment any greater effect than it enjoys in Louisiana. Since such judgment does not become "payable" against the State of Louisiana until its legislature deems it so, it, likewise, cannot be enforced in the State of New York.

The doctrine of comity provides us with further guidance. It is settled that the doctrine of comity "is not a rule of law, but one of practice, convenience and expediency" (*Ehrlich-Bober & Co. v University of Houston*, 49 NY2d 574, 580, 404 N.E.2d 726, 427 N.Y.S.2d 604 [1980], quoting *Mast, Foos & Co. v Stover Mfg. Co.*, 177 U.S. 485, 488, 20 S. Ct. 708, 44 L. Ed. 856, 1900 Dec. Comm'r Pat. 285 [1900], *see also Sachs v Adeli*, 26 AD3d 52, 55, 804 N.Y.S.2d 731 [2005]). It is not a mandate, but a voluntary decision to defer to the laws and policies of a sister state (*Deutsche Bank Sec., Inc. v Montana Bd. of Invs.*, 7 NY3d 65, 73, 850 N.E.2d 1140, 818 N.Y.S.2d 164 [2006], *cert denied* ___ U.S. ___, 127 S Ct 832, 166 L. Ed. 2d 665 [2006]; *Crair v Brookdale Hosp. Med. Ctr.*, 94 NY2d 524, 529, 728 N.E.2d 974, 707 N.Y.S.2d 375 [2000]).

In the matter at bar, the underlying events took place in Louisiana, impacted Louisiana citizens, and were litigated exclusively in Louisiana courts. In contrast, the rights of New York citizens are not

involved in any manner, and New York has absolutely no connection to the events giving rise to the Louisiana judgment. Indeed, New York has absolutely nothing at stake in this matter, whereas the case implicates, and seeks to circumvent, Louisiana's laws and state constitution. As a result, we find that this is just such a case where we should defer to the laws of our sister state.

We further note that the cases cited by plaintiffs are unavailing, as the state in which enforcement is sought in those matters has an interest in protecting its citizens, or in the transaction itself, unlike here, where New York has no discernible interest at all (*Nevada v Hall*, 440 U.S. 410, 99 S. Ct. 1182, 59 L. Ed. 2d 416 [1979] [held that California residents injured on a California highway by a Nevada state-owned vehicle could recover in a California court under California law, despite a Nevada statute limiting tort recovery against that State to $ 25,000]; *Ehrlich-Bober & Co., Inc. v University of Houston*, 49 NY2d at 581 [permitted an action against a Texas State University to go forward in New York, notwithstanding a Texas statute limiting venue to two specified Texas counties, because comity did not require giving the Texas statute precedence over New York's compelling interest in providing a forum for redress of an injury that arose from a commercial transaction centered in New York and, further, that the implicated Texas statute was an administrative restriction on venue, not an "attempt to limit the liability of the State so as to safeguard the public fisc, a limitation which, conceivably might be found essential to the governmental function"]; *Deutsche Bank Sec., Inc. v Montana Bd. of Invs.*, 7 NY3d at 73 [held that action should not be dismissed, despite

a Montana statute limiting venue to Montana, because the lawsuit arose from a transaction that occurred in New York, New York had a compelling interest in protecting its residents, its preeminence as a commercial and financial capital, and the strong policy of providing a forum for redress of injuries arising out of transactions spawned here]).

Merely because the contingent award of damages to plaintiffs is denominated as a "judgment" under Louisiana law, it does not follow that it is a judgment within the meaning of CPLR 5402. In our view, CPLR 5402 does not contemplate a foreign judgment that is a judgment only nominally, but instead contemplates an actual judgment, i.e., one that is enforceable in the jurisdiction in which it is rendered. Moreover, to construe CPLR 5402 as excluding a "judgment" that is unenforceable in the rendering jurisdiction, is consistent with the Restatement (Second) of Conflict of Laws (*see* Restatement [Second] of Conflict of Laws § 111, Comment a ["the judgment will not be enforceable in the other states so long as it remains unenforceable in the state of rendition. A judgment will not be given greater effect abroad than it enjoys at home"]; Restatement [Second] of Conflict of Laws § 115, Comment b ["the local law of the state of rendition will be applied to determine whether equitable relief can be obtained against the judgment"]).

Finally, we disagree with the dissent's conclusion that a stay must be pursuant to a judicial act, and with the blanket statement that "we must presume, in the absence of authority to the contrary, that the Louisiana courts expect their judgment will be enforced." CPLR 5519, entitled "Stay of enforcement," subdivision (a), entitled "Stay without court

order," provides seven different instances in which the enforcement of a judgment will be stayed, by operation of law, and without a court order.

Moreover, it is quite clear to us, from a review of Louisiana case law, that the Louisiana courts are well aware of the constitutional and statutory restrictions on the payment of judgments pending approval by their legislature and, although the courts may not approve of that mechanism, they have declined to circumvent it, or rule it unconstitutional (*see e.g. Batson v South Louisiana Med. Ctr.*, 965 So2d 890, 2007 La App LEXIS 1207, 2007 WL 1696685 [La 2007], *writ denied* 964 So2d 945 [La 2007] [article XII [§ 10(C)] of the Louisiana Constitution is aimed at protecting the public fisc and seeks to avoid upsetting governmental priorities by the payment of substantial money judgments]; The *Newman Marchive Partnership, Inc. v City of Shreveport*, 962 So2d at 1078-1079 ["[w]hile this court recognizes and sympathizes with plaintiff's plight in getting its judgment against the City satisfied, we are without constitutional or statutory authority to compel the City to pay the judgment rendered against it. The constitutional waiver of sovereign immunity, together with the lack of legislation enabling enforcement, provides Newman with a right without a remedy. The remedy to this anomaly, however, is in the hands of the legislature, not the judiciary. To hold otherwise would create a separation of powers issue and have grave constitutional implications", citing *Landry v City of Erath*, 628 So2d 1178 [La 1993], *writ denied* 635 So2d 235 [La 1994]; *Foreman v Vermilion Parish Police Jury*, 336 So2d 986, 989 [La 1976], *writ refused* 339 So2d 846 [La 1976] ["[t]he state clearly

has the right to regulate the way in which judgments against its political subdivisions can be paid, and to prohibit the seizure of property owned by those subdivisions. In our opinion, the methods provided in the above cited statutes and constitutional provisions do not offend the rights granted to the judgment creditor by the Fourteenth Amendment of the Federal Constitution]").

Accordingly, the order of the Supreme Court, New York County (Charles E. Ramos, J.), entered September 18, 2006, which denied plaintiffs' motion for leave to make two technical changes in a Louisiana judgment so that it could be docketed in New York, and vacated plaintiffs' filing of that judgment, should be affirmed, without costs.

All concur except Catterson, J. who dissents in an Opinion.

CATTERSON, J. (dissenting)

Because I believe that the motion court erred in *sua sponte* vacating the plaintiffs' CPLR 5402 filing of a judgment against the State of Louisiana and in denying their motion for technical corrections to that filing, I respectfully dissent.

The facts of the underlying action brought in Louisiana are undisputed but should be noted nonetheless. In April 1983, a "devastating flood" occurred in Tangipahoa Parish, damaging the plaintiffs' property.[1] *Boudreaux v. State of Louisiana*,

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[1] From April 6 through April 9, 1983 a torrential rain fell in southern Louisiana, eventually causing the worst flooding in the history of Washington-St.Tammany-Tangipahoa Parish areas.

906 So.2d 695, 699 (La. Ct. App. 2005), *writ denied*, 924 So.2d 1018 (La. 2006). A year later, the plaintiffs brought a class action in Louisiana state court, alleging that the Louisiana Department of Transportation designed and built a bridge for Interstate 12 over the Tangipahoa River in a negligent and improper manner which prevented the river's floodwaters from escaping through their natural flood channel. The plaintiffs prevailed on liability (*Boudreaux v. State of Louisiana*, 780 So.2d 1163 (La. Ct. App. 2001), *writ dismissed*, 815 So.2d 7 (La. 2002)), and, after appeal, were awarded $91,846,957.04, plus interest from April 10, 1984.

Louisiana's Constitution waives sovereign immunity. La. Const., art. XII, § 10(A). However, it also states that "no public property or public funds shall be subject to seizure . . . No judgment against the state . . . shall be exigible, payable, or paid except from funds appropriated therefor by the legislature." *Id.* at § 10(C). To date, the Louisiana Legislature has failed to appropriate funds to pay the *Boudreaux* judgment.

On August 11, 2006, the plaintiffs attempted to file the Louisiana judgment in New York pursuant to CPLR 5402. However, the clerk of the court informed the plaintiffs' counsel that: (1) the portions of the judgment which were in favor of the class (as opposed to the individual plaintiffs) could not be docketed and that it would be appropriate to docket the judgment in favor of the attorneys for the class; and, (2) the clerk could not compute and enter pre-judgment interest on a non-New York judgment. The

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Indeed, the Tangipahoa River reached record flood stage, higher than that seen in the Great Mississippi Flood of 1927, which coincidentally, put Herbert Hoover in the White House.

plaintiffs then moved by order to show cause to correct these two technical problems.

The defendant opposed the motion, arguing that the plaintiffs' only remedy was to wait for the Louisiana Legislature to appropriate funds to pay the judgment. The plaintiffs then attempted to file reply papers to address the factual averments and legal arguments raised by the defendant, but the court refused to accept any submissions on the issue.[2]

Relying solely on article XII (§ 10(C)) of the Louisiana Constitution, the motion court denied the plaintiffs' attempt to correct the two technical defects and ordered the clerk of the court to vacate the filing of the judgment. The court construed § 10(C) as a stay of enforcement. The court then characterized the motion as "a waste of time" and "frivolous", saying that it would sanction the plaintiffs if it were not (the anniversary of) September 11.

The plaintiffs contend that the motion court should have granted their motion for technical corrections to the judgment and should not have vacated the filing of the Louisiana judgment. I submit that the plaintiffs are correct.

CPLR 5402(a) states:

> "A copy of any foreign judgment authenticated in accordance with . . . statutes of this state may be filed within ninety days of the date of

[2] While I recognize that the decision to allow reply papers ordinarily rests in the sound discretion of the motion court, the court's decision to *sua sponte* vacate the foreign judgment filed pursuant to CPLR 5402 certainly entitled plaintiffs to be permitted to respond to the arguments raised by the defendant. To not allow the plaintiffs that opportunity was, I believe, a clear abuse of discretion.

> authentication in the office of any county clerk of the state. The judgment creditor shall file with the judgment an affidavit stating that the judgment was not obtained by default in appearance or by confession of judgment, that it is unsatisfied in whole or in part, the amount remaining unpaid, and that its enforcement has not been stayed, and setting forth the name and last known address of the judgment debtor."

The only requirement of CPLR 5402(a) that is in dispute is whether enforcement of the Louisiana judgment has been stayed. Indeed, that appears to be the sole basis for the court's ruling. It is plain, however, that article XII, (§ 10(C)) of the Louisiana Constitution is not a stay. In New York, a stay is ordinarily a judicial act; "a direction of the *court.*" *1544-48 Props., L.L.C. v. Maitre*, 184 Misc.2d 984, 985, 712 N.Y.S.2d 303, 304 (App. Term, 2d Dept. 2000) (emphasis added); *see also* CPLR 2201 ("*the court* in which an action is pending may grant a stay of proceedings") (emphasis added). No Louisiana court has stayed enforcement of the *Boudreaux* judgment; on the contrary, we must presume, in the absence of authority to the contrary, that the Louisiana courts expect that their judgment will be enforced. *See Baudoin v. Acadia Parish Police Jury*, 702 So.2d 715, 720 (La. Ct. App. 1997), *writ denied*, 706 So.2d 458 (La. 1997) (governmental defendant's refusal to pay if able to do so disrespected court's judgment).

The defendant contends and the majority agrees that the Louisiana judgment should not be given greater effect in New York than it would in Louisiana. This argument is similarly unavailing as it

conflates two different concepts: the effect of a domestic judgment on state assets versus the ability to enter a foreign judgment pursuant to the Full Faith and Credit Clause.

The U.S. Supreme Court has made it plain that "[a] final judgment in one state, if rendered by a court with adjudicatory authority over the subject matter and persons governed by the judgment, qualifies for recognition throughout the land." *Baker by Thomas v. Gen. Motors Corp.*, 522 U.S. 222, 233, 118 S.Ct. 657, 663-664, 139 L.Ed.2d 580, 592 (1998). Furthermore, "[f]ull faith and credit . . . does not mean that States must adopt the practices of other States regarding the time, manner, and mechanisms for enforcing judgments. Enforcement measures do not travel with the sister state judgment . . . ; such measures remain subject to the . . . control of forum law." *Id.* at 235.

The New York Court of Appeals has reached a similar result. In *Morris Plan Indus. Bank v. Gunning* (295 N.Y. 324, 67 N.E.2d 510 (1946)), the plaintiff held an unsatisfied Pennsylvania judgment against the defendant, who lived and worked in Pennsylvania. *Id.* at 327. Pennsylvania law did not permit the plaintiff to garnish or attach the defendant's wages. *Id.* at 328. However, New York law allowed the plaintiff to garnish 10% of the defendant's wages. *Id.* The Court stated "questions of garnishment and attachment are decided by the law of the forum since they deal with remedies. Therefore, the Pennsylvania law forbidding garnishment of wages has no effect in New York, although the wages attached were earned in Pennsylvania." *Id.* at 331-332 (cita-

tions omitted);[3] *see* Restatement (Second) of Conflict of Laws § 99 ("[t]he local law of the forum determines the methods by which a judgment of another state is enforced").[4]

"Every state has jurisdiction to determine for itself the liability of property *within its territorial limits* to seizure and sale under the process of its courts." *Clark v. Williard*, 294 U.S. 211, 213, 55 S.Ct.356, 357, 79 L.Ed.865, 867 (1935) (emphasis added). Thus, the defendant has every right to exempt its property *in Louisiana* from seizure. However, if the defendant chooses to hold a bank account or real property in New York, it simply cannot dictate that its New York-sited property must be exempt from seizure. The majority cites no authority to the contrary. Indeed, the cases cited by the majority are Louisiana State court decisions concerning the effect of a judgment on property of the State located within the State. *See also Baker by Thomas*, 522 U.S. at 232 ("The Full Faith and Credit

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[3] The defendant seeks to distinguish *Morris* on the basis that a New York statute was involved in that case. However, that distinction is immaterial to the application of a different New York statute: CPLR 5402.

[4] The Restatement sections cited by the defendant (§§ 111 and 115) and adopted by the majority are inapplicable. Section 111 says, "A judgment will not be enforced in other states if the judgment is not subject to enforcement in the state of rendition because the judgment is subject to a condition not yet performed." An example of a condition is that "A shall recover $10,000 against B when A has tendered B a good and sufficient deed conveying certain land." Restatement (Second) of Conflict of Laws § 111, Comment c, Illustration 2. Section 115 says, "A judgment will not be recognized or enforced in other states if upon the facts shown to the court equitable relief could be obtained against the judgment in the state of rendition."

Clause does not compel a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate.' "), *quoting*, *Pacific Employers Ins. Co. v. Industrial Accident Comm'n.*, 306 U.S. 493, 501, 59 S.Ct. 629, 632, 83 L.Ed.940, 944 (1939). There simply is no basis in law to hold that New York must give Louisiana's Constitution extraterritorial effect.

De Nunez v. Bartels (241 A.D.2d 414, 661 N.Y.S.2d 602 (1st Dept. 1997)), cited by the defendant, is not to the contrary. There, the Louisiana district court judgment that the petitioner sought to enforce in New York was modified by a Louisiana appellate court. *Id.* at 415-416, 661 N.Y.S.2d at 603-604. By contrast, in the case at bar, the Supreme Court of Louisiana has denied writs of certiorari (*Boudreaux v. State of Louisiana*, 924 So.2d 1018 (La. 2006) and 924 So.2d 174 (La. 2006)), so there is no danger that the judgment sought to be enforced will be modified.

The defendant also contends that, as a matter of comity, New York should decline to enforce the judgment against it. I disagree on two grounds.

First, the procedure under CPLR article 54 is clear. It requires immediate recognition of a final sister state judgment rendered with jurisdiction. Siegel, *Practice Commentaries*, McKinney's Cons. Laws of N.Y., Book 7B, C5402:2, at 570; *see Fauntleroy v. Lum*, 210 U.S. 230, 28 S.Ct. 641, 52 L.Ed. 1039 (1908). Louisiana has no more right to object to the docketing of this judgment on the grounds of comity than it would have to the docketing of any judgment, by any party, against it. Such judgments are subject to immediate filing and dock-

eting in accordance with CPLR article 54, without notice being sent to Louisiana until 30 days after filing. Certainly, the ministerial corrections requested by plaintiffs, even if unremedied, are mere "defect[s]" or "irregularit[ies]" which do not "stay[ ], impair[ ] or affect[ ] the validity or enforceability of the judgment. CPLR 5019(a). Indeed, under similar circumstances it appears uncontroverted that Louisiana itself would require docketing under its Enforcement of Foreign Judgments Act. *Littleton v. Moss*, 914 So.2d 51, 55 (La. Ct. App. 2005).

Second, public policy of this state requires enforcement of the judgment. "[W]here there is a conflict between our public policy and application of comity, our own sense of justice and equity as embodied in our public policy must prevail." *J. Zeevi & Sons, Ltd. v. Grindlays Bank (Uganda) Ltd.*, 37 N.Y.2d 220, 228, 371 N.Y.S.2d 892, 899, 333 N.E.2d 168, 173 (1975), *cert. denied*, 423 U.S. 866, 96 S.Ct. 126, 46 L.Ed.2d 95 (1975). Surely it is just and equitable for the plaintiffs, who were injured more than 20 years ago, due to the malfeasance of an agent of the defendant, to be compensated for their losses.

The defendant's public policy is that it is for the legislature to decide when a valid judgment rendered against it is satisfied from the public fisc. However, this public policy can necessarily apply only to property of Louisiana that remains in the state. If the defendant chooses to do business here, it should not expect treatment other than that accorded by state law in New York.

The motion court ruled on the basis of its understanding of sovereign immunity. However, Louisiana has, by its constitution, waived sovereign immunity.

The Louisiana Constitution is clear—the State has "[n]o immunity in [c]ontract or tort." La. Const. art. XII, § 10(A).[5] The judgment in question arises out of torts committed by the state and, therefore, immunity has been waived. The underlying action was tried by a Louisiana state court and affirmed by the Louisiana Court of Appeals. A *writ of certiori* was denied by Louisiana's Supreme Court. The motion court erred in characterizing this as an exercise of sovereign immunity, when it is nothing more than an exemption from execution for assets of the state. *See* La. Const. article XII § 10(C).[6]

In *Nevada v. Hall*, (440 U.S. 410, 99 S.Ct. 1182, 59 L.Ed.2d 416 (1979)) and in *Ehrlich-Bober & Co., Inc. v. University of Houston* (49 N.Y.2d 574, 427 N.Y.S.2d 604, 404 N.E.2d 726 (1980)), the U.S. Supreme Court and the New York Court of Appeals

[5] Article XII, § 10(A) provides: "No immunity in Contract and Tort.—Neither the state, a state agency, nor a political subdivision shall be immune from suit and liability in contract or for injury to person or property."

[6] Article XII, § 10(C) provides: "*Limitations; Procedure; Judgments.*—Notwithstanding Paragraph (A) or (B) or any other provision of this Constitution, the legislature by law may limit or provide for the extent of liability of the state, a state agency, or a political subdivision in all cases, including the circumstances giving rise to liability and the kinds and amounts of recoverable damages. It shall provide a procedure for suits against the state, a state agency, or a political subdivision and provide for the effect of a judgment, but no public property or public funds shall be subject to seizure. The legislature may provide that such limitations, procedures, and effects of judgments shall be applicable to existing as well as future claims. No judgment against the state, a state agency, or a political subdivision shall be exigible, payable, or paid except from funds appropriated therefor by the legislature or by the political subdivision against which the judgment is rendered."

made clear that exceptions or limitations on the obligation of the state to pay a judgment need not be recognized as a matter of full faith and credit, nor deferred to as a matter of sovereign immunity. In *Nevada v. Hall*, Nevada waived sovereign immunity as to tort suits against the state provided that they were expressly limited to a judgment cap of $25,000. The Supreme Court upheld a California judgment against Nevada which ignored the damage cap on the ground that any alleged sovereign immunity did not apply in California, and California was not required to enforce Nevada's limitation on damages.

Similarly, in *Ehrlich-Bober & Co., Inc.*, the State of Texas waived sovereign immunity provided that any suit against the state was required to be brought in the State of Texas courts. The Court of Appeals disregarded the Texas public policy and upheld a judgment entered in an action brought in the New York Supreme Court in complete disregard of Texas's claim of sovereign immunity. Thus, Louisiana's claim of sovereign immunity does not automatically provide it with a defense in a New York court as it would in Louisiana. *See also Deutsche Bank Sec., Inc. v. Montana Bd. of Invs.*, 7 NY3d 65, 73, 818 N.Y.S.2d 164, 168, 850 N.E.2d 1140, 1144 (2006), *cert denied*, ___ U.S. ___, 127 S.Ct. 832, 166 L.Ed.2d 665 (2006).

The size of the judgment—$270,837,526.85 as of August 9, 2006, when interest is included—may seem daunting. However, there are 1,286 plaintiffs. *Boudreaux*, 906 So.2d at 703. Moreover, the amount of interest ($178,990,569.81 as of August 9, 2006, is partly defendant's fault: it chose to appeal multiple times. *Boudreaux v. State of Louisiana*, 690 So.2d

114 (La. Ct. App. 1997) (class certification); *Boudreaux v. State of Louisiana*, 780 So.2d 1163 (La. Ct. App. 2001), *writ dismissed*, 815 So.2d 7 (La. 2002) (liability); *Boudreaux v. State of Louisiana*, 906 So.2d 695 (La. Ct. App. 2005), *writ denied*, 924 So.2d 1018 (La. 2006) (damages). In any event, finding in the plaintiffs' favor on the instant motion does not necessarily mean that the defendant will immediately have to pay $270 million; it merely means that the plaintiffs can begin discovery into the defendants' assets in New York.

THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JANUARY 24, 2008

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL PART 53

INDEX NO. 061112/87

60 Centre Street
New York, NY 10007
September 11, 2006

JEAN BOURDREAUX, and the victims of the Flood on April 6, 1983, on the Tangipahoa River,

Plaintiff,

—against—

THE STATE OF LOUISIANA,
DEPARTMENT OF TRANSPORTATION,

Defendant.

MOTION TO SHOW CAUSE

B E F O R E :

HONORABLE CHARLES E RAMOS, Justice.

APPEARANCES:

FOLKENFLIK & MCGERITY, LLP
Attorneys for Plaintiff
1500 Broadway
New York, NY 10036
BY: MAX FOLKENFLIK, ESQ.
BYARD EDWARDS, ESQ.
HENRY G. TERHOEVE, ESQ.

ORRICK HERRINGTON & SUTCLIFFE, LLP
Attorneys for Defendant
666 Fifth Avenue
New York, NY 10103
BY: MICHAEL STOLPER, ESQ.
CAROLINE S NOLAN, ESQ.

MILLICENT J. ANGIULLI
Official Court Reporter

[2] THE COURT: Good morning.

MR. FOLKENFLIK: Good morning, Your Honor.

MR. STOLPER: Good morning, Your Honor.

THE COURT: This is the State of Louisiana. We always get cases here involving the State Louisiana.

This is plaintiff's motion?

MR. FOLKENFLIK: This is an order to show cause, sir.

THE COURT: Proceed.

MR. FOLKENFLIK: Your Honor, if I might start with some housekeeping matters, we had in light of the answering papers, which raised certain alleged constitutional issues, we prepared a reply affidavit and reply memorandum of law.

We served the State on Friday and I would like to hand that in as part of the record today.

MR. STOPLER: Your Honor, when [3] this case was before Judge Edmead there was a telephonic conference. I was not part of that, but my understanding is it was during that telephonic conference that the Judge specifically said they could not put in reply papers. We were putting in opposition papers. That there was no, specifically she said there would be no reply papers.

MR. FOLKENFLIK: Wha Judge Edmead said, Your Honor, was that as a matter of right I don't have to reply, which is true. Under the rules there is no reply allowed, as a matter of course for order to show cause.

I think it is important, Your Honor, given some incorrect statements in the answering papers as well

as we address the constitutional issues which, as I will point out later, are not really implicated in today's proceedings, but because they are serious matters we thought we could address them nonetheless.

[4] THE COURT: We may have to address them, but Rule 20 of the Commercial Division makes it clear absent permission, reply papers should not be submitted on an order to show cause.

At this point hold onto your papers. We will see if they are necessary. If so, we will give the State an opportunity to respond as well because there are additional papers, they are not authorized by the CPLR.

You are here to enforce a judgment.

MR. FOLKENFLIK: Yes, a judgment enforcement proceeding, Your Honor. This proceeding today, there is less here than meets the eye. What we have asked for are two very simple things with respect to docketing of a judgment in accordance with Article 54.

THE COURT: Docketing?

MR. FOLKENFLIK: Yes. When I went down to file this judgment, which has been filed as my papers in support of the [5] order to show cause demonstrate, the judgment clerk, Steve Kubenik and I discussed the nature of the problems of docketing the judgment.

And there are two that were really technical issues where the forms supplied by the Louisiana Court were at variance with what would be required here.

The first and simplest is that in the New York State judgment if the Judge orders the payment of

interest under CPLR 500-2, the clerk is directed to compute the interest and enter it, which he does on the basis of attorneys' affidavits in the ordinary course, as Your Honor is aware.

When it comes to docketing of a foreign judgment, however, Mr. Kubenik said "does the judgment provide for interest?," There is a statutory right from legal demand and I submitted the appropriate affidavit.

Mr. Kubenik indicated he could not compute interest on a foreign judgment **[6]** the way they did on New York judgments.

THE COURT: Because they do not know what interest rate applies?

MR. FOLKENFLIK: It might be that, but in any event he asked me to bring it to a judge and have—

THE COURT: You have a judgment for a sum of money.

MR. FOLKENFLIK: I have a judgment for 91 million dollars.

THE COURT: That was, I suppose, entered in Louisiana?

MR. FOLKENFLIK: That was entered in Louisiana, in 2003, and affirmed by the Court of Appeals, the judgment, but the case has been pending since 1983, and so the prejudgment interest under Louisiana law runs from the filing of the complaint.

And I attached to my affidavit to Mr. Kubenik, but in all deference, Your Honor, he would, under the ordinary course review my papers and see if they were sufficient.

[7] THE COURT: And these papers you set forth what the Louisiana interest rate is?

MR. FOLKENFLIK: I set forth Louisiana schedule, how many days, at what percentage interest, all obtained from the Louisiana Bar Association website, which has calculator and prepares that background.

THE COURT: What I can do is prepare an order that would set forth, is it 91 million dollars?

MR. FOLKENFLIK: The 91 million dollars is principal.

THE COURT: And direct the clerk to compute interest based on the schedule.

MR. FOLKENFLIK: Yes. And the interest that is computed was as of August 9, 178 million dollars, plus $28,000 per day.

THE COURT: This is an old case.

MR. FOLKENFLIK: Yes. So I set [8] forth all of that, and that is very routine. Then as I said if it was not a foreign judgment, but if Your Honor entered a judgment in the exact same form Mr. Kubenik would have no—

THE COURT: Let me ask you a question, the judgment was obtained many years ago in Louisiana, why hasn't it been enforced?

MR. FOLKENFLIK: It wasn't obtained many years ago in Louisiana. The order, the complaint was filed many years ago. The judgment was entered in 2003.

THE COURT: When was the trial?

MR. FOLKENFLIK: Mr. Edwards, who is here with me, and one of the things I would like to hand up is an application for pro hoc admission, which I do not believe would be opposed.

The trial occurred in 2002.

THE COURT: So it was a recent trial.

MR. FOLKENFLIK: Yes, judgment [9] in 2003, affirmed by the Court of Appeals in 2004, I believe, and then it went up on a writ of certiorari to Louisiana Supreme Court, and the writ was denied this year, 2006.

So since that time, the judgment has been, and we have—

THE COURT: When was the judgment entered in Louisiana as a judgment?

MR. FOLKENFLIK: The initial judgment by the trial court was entered in 2003.

THE COURT: Why hasn't it been enforced in Louisiana?

MR. FOLKENFLIK: Because the appeal was pending through 2006.

THE COURT: There is an automatic stay?

MR. FOLKENFLIK: And there was a stay of proceedings in the Louisiana Court, the Supreme Court—

THE COURT: Why isn't judgment being enforced in Louisiana?

[10] It probably has most of its assets.

MR. FOLKENFLIK: There are limitations under Louisiana law and constitution on the execution of judgments against State property in Louisiana.

Those limitations as a matter of governing New York law, and United States Supreme Court law do not apply in New York.

The judgment has been docketed in a variety of counties in Louisiana and there is a lien on properties in more than ten separate parishes, which is what they call the equivalent of our counties, but they have not been able to seize assets; and the Legislature, which is required by constitution to appropriate funds to pay a judgment, has thus far refused to do so.

And the State of Louisiana has made clear they are not willing to pay this judgment. So we are pursuing the other remedies available to us, including [11] remedy of execution in New York under the full faith and credit clause.

THE COURT: So you can attach assets out of the State of Louisiana but not in the State?

MR. FOLKENFLIK: Indisputably both are correct.

THE COURT: Defendant—

MR. FOLKENFLIK: And if Your Honor, may I just—the leading Supreme Court case was decided by Justice Cordoza a Century ago—

THE COURT: He had this case?

MR. FOLKENFLIK: Not this particular case, it was already old enough for him to have done so. The leading New York State Court says, which is a case called Morris Plan vs. Gunning, which I also cite, and two Supreme Court cases which are more recent, Foley, which was decided in the 1940's, and more recently a case called Hitchcook.

All of these cases stand for THE indisputable proposition, and goes back [12] before Clark vs.

Willard, that exemption laws of the rendering State which issued the judgment do not follow the judgment when it is enforced in other states; and we also cited in our memorandum in support, which indicates there is no sovereign immunity—

THE COURT: Hold on. Are those cases involved in a state or private judgment?

MR. FOLKENFLIK: The cases I referred to, other than the last, involved private judgments, not states.

THE COURT: We are dealing with a Sovereign. If it wishes to have immunity has it—

MR. FOLKENFLIK: The two cases that address that concept in matters governing New York law, there is no sovereign immunity, which we cited in our moving papers, Nevada vs. Hall in the United States Supreme Court where there was a limitation on the $25,000 liability against the State of Nevada.

[13] THE COURT: The State of Louisiana was not sued in New York State, were they?

MR. FOLKENFLIK: They were sued in Louisiana.

THE COURT: They were sued because of things that occurred in Louisiana.

MR. FOLKENFLIK: That's correct.

THE COURT: I can understand if Louisiana caused an injury in Texas, limitations that Louisiana law might put on its own liability might not be effective. You have a conflict between Texas law and Louisiana law, but there is an intra Louisiana situation. Something happened in Louisiana, Louisiana resident sued and won in Louisiana.

MR. FOLKENFLIK: Here is where that analysis breaks down, if I may, Your Honor. It is not a question, according to governing Supreme Court law in the case of Baker v Thomas, which was cited [14] in defendant's paper, proves the point. It is not a question of conflicts of law analysis, which Your Honor is referring to, it's a question—there are two questions.

Number one, is there sovereign immunity, and the answer in Nevada vs. Hall, in Ehrlich-Bober case, cited by the New York Court of Appeals, recently reaffirmed in the case we did not cite in our papers, Deutsche Bank case in 2006.

There is no state sovereign immunity when it comes to enforcement in another state, period, end of story, number one.

THE COURT: Wait a minute, the State of New York is sovereign. It has immunity, unless it waives it. I sue the State and I get a judgment. It's meaningless. It is meaningless, but it's sovereign. I get a default or whatever.

I go to another state to enforce it, and you are telling me a sovereign immunity is waived and I can enforce a [15] valid New York judgment?

Of course not.

MR. FOLKENFLIK: You say it's an invalid New York judgment? Of course it is not entitled to full faith and credit. If it is a valid judgment, and here is where the analysis breaks down, first of all—

THE COURT: What does Louisiana law say about the enforcement of a judgment like this?

MR. FOLKENFLIK: There are two things, Louisiana's Constitution absolutely, unequivocally, completely waives sovereign immunity.

THE COURT: So you can sue the State.

MR. FOLKENFLIK: Yes, and you can have recourse judgment, and the judgment is enforceable.

The second thing is Louisiana places some restrictions on execution on property within the State of Louisiana.

THE COURT: Do you have a copy [16] of that?

MR. FOLKENFLIK: It is cited verbatim in my moving memorandum.

THE COURT: Let me find it.

MR. STOLPER: Your Honor—

MR. FOLKENFLIK: It appears at foot note two at pages two and three of the moving memorandum.

MR. STOLPER: Your Honor, I have a copy, if you like.

THE COURT: You might as well. I am having trouble finding it.

(Handed to Court).

THE COURT: This is article XII of the Constitution.

MR. STOLPER: Louisiana's Constitution, Your Honor.

MR. FOLKENFLIK: Article XII section 10.

THE COURT: So Section 10(a) waives sovereign immunity.

To the extent it's set forth there. My experience has been that no state waives sovereign immunity [17] completely. But okay.

So it sounds like what New York says, we waive sovereign immunity, but, and we waive it to the extent you can sue us in the Court of Claims, and there are certain restrictions in the Court of Claims.

MR. FOLKENFLIK: Exactly.

THE COURT: So they have procedures.

MR. FOLKENFLIK: Well, they have an execution procedure, not a procedure for enforcing.

THE COURT: Excuse me, I am still trying to understand this. It says the Legislature may limit the extent of liability. So they can put a cap on liability, for example.

MR. FOLKENFLIK: There is no cap that is applicable to—

THE COURT: But they could.

MR. FOLKENFLIK: They could.

THE COURT: All right. And the circumstances giving rise to [18] liability. So they can say we will be responsible for a faulty bridge that collapses, but we will not be responsible for an airplane crash.

MR. FOLKENFLIK: Theoretically they could, but they have not.

THE COURT: Right. It shall provide a procedure for suits against the State. That is pretty ordinary. A state agency or political subdivision and provide for the effect of a judgment, but no public property or public funds shall be subject to seizure.

So you cannot seize any of Louisiana's public property or public funds.

MR. FOLKENFLIK: Within Louisiana.

THE COURT: No, no. It says you cannot. It does not say within Louisiana.

MR. FOLKENFLIK: The United States Supreme Court in the New York Court of Appeals says that.

THE COURT: Where in the Court [19] of Appeals? Not in a case involving Louisiana, but in a similar situation?

MR. FOLKENFLIK: Yes.

THE COURT: Where a state has restricted suits against itself?

MR. FOLKENFLIK: Yes.

THE COURT: What case do you have?

MR. FOLKENFLIK: I cited in the moving memorandum Ehrlich-Bober vs University of Houston.

THE COURT: Do you have a copy of the case?

MR. FOLKENFLIK: I don't have a copy with me.

THE COURT: Then it's hard for me to read it.

MR. FOLKENFLIK: Your Honor, I didn't bring a copy with me, but let me give Your Honor the fact pattern.

THE COURT: Please.

MR. FOLKENFLIK: In the fact pattern in Ehrlich-Bober the State of [20] Texas had restricted suits against its instrumentality of the State, including the University of Houston in the same way New York does.

If you had a Court of Appeals procedure it had to be within the Court of the State in a specialized court. In that case there was a suit filed in the New York Court and it didn't comply with the Texas procedures.

So the question was, does that State limitation on procedure and State sovereign immunity and limitation on the waiver prohibit the New York City Courts from entering a decision.

THE COURT: What I am concerned with here is—

MR. FOLKENFLIK: Let me just get to—

THE COURT: Here is my problem. I am not concerned here about a New York judgment. I am concerned about Louisiana judgment, and Louisiana judgment is a creation of Louisiana law. [21] You can't take a judgment that is this large and just by moving it to another state it becomes twice the size.

MR. FOLKENFLIK: Actually, Your Honor, the judgment is not changing at all.

THE COURT: Hold it. I am using a simple analogy. The more specific analogy is here you got a judgment that apparently cannot be used to seize public property of the State of Louisiana that is like a condition on the judgment.

MR. FOLKENFLIK: No, it is not.

THE COURT: It is not?

MR. FOLKENFLIK: It's an exemption from enforcement, the judgment. It's an exemption from enforcement, and the law is crystal clear.

If I may read, Your Honor, from Justice Cardoza in the Clark vs.—

THE COURT: How much do you get paid if you sue the State?

MR. FOLKENFLIK: Well, until now, until now the State of Louisiana has [22] always appropriated funds and paid judgments. This is the first time they have refused to do so.

Now, in the State of New York, Your Honor, what happens—

THE COURT: Wait a minute, I didn't read the whole section.

I see, so the Legislature, except from funds appropriated by the Legislature.

MR. FOLKENFLIK: We think the constitutional command is clear that the Legislature must appropriate funds.

THE COURT: All right then, bring a mandamus in Louisiana.

MR. FOLKENFLIK: But the Louisiana Court has not as yet recognized a mandamus remedy.

THE COURT: In other words, you loose.

MR. FOLKENFLIK: We have not lost because in the full faith and credit clause, Your Honor does not have the discretion—

[23] Oh, I do have a copy of Ehrlich-Bober.

(Handed to Court).

THE COURT: From the headnote, I know I don't have to read anymore: Where an action concerns a wholly commercial transaction centered in New York, and it is one of which New York Courts would otherwise properly have jurisdiction, they are not precluded from the exercise of that jurisdiction by assertion of Government immunity as a matter of comity.

I agree, next case.

MR. FOLKENFLIK: If Your Honor reads beyond the headnotes, you will see that Justice Wachtler said in the opinion, made it clear that the sovereign immu-

nity of Texas docs not apply in New York. And in the issue New York—

THE COURT: Sir, give me a case that has similar facts to this one.

MR. FOLKENFLIK: Well, the similar fact cases on executions and **[24]** exemptions from attachment do not involve states, they involve individuals, but what Ehrlich-Bober makes clear is there is no difference.

If you look at Nevada v Hall, if I may hand that up, United States Supreme Court, $25,000 limitation on judgment.

A limitation similar to this.

THE COURT: This is an accident that occurred other than in the State, correct?

MR. FOLKENFLIK: That—

THE COURT: Government Pataki goes for a ride in New Jersey, has an accident, kills somebody in New Jersey. Of course, New Jersey can sue him and to heck with sovereign immunity.

I agree that is not this case.

MR. FOLKENFLIK: The answer to that is also in the Baker case where Justice **[25]** Ginsberg said there is a distinct difference between enforcement of judgments and comity decisions, which are choice of law choices. And Justice Ginsberg said, quote, our decision supports no roving public policy exception to the full faith and credit due judgments.

THE COURT: But the judgment here comes with an infirmity.

MR. FOLKENFLIK: It does not.

THE COURT: It does, read the Constitution.

MR. FOLKENFLIK: That is not an infirmity in the judgment, according to governing New York law. As I said—

THE COURT: You do not have a case that comes anywhere close to this.

Do not tell me about governing New York law. This is a joke that you handed up. It is not even close.

MR. FOLKENFLIK: It is close on the issue of whether or not you should enforce the State's limitations on recovery. It is more than close, it is governing.

THE COURT: If there is a New York State interest I can understand **[26]** where we might want to exercise our power.

If Governor Pataki goes to New Jersey and injures somebody there, the State of New Jersey has an interest in protecting its people.

I don't know what happened.

Is this a class action?

MR. FOLKENFLIK: This is a class action. This is a flood case, that Louisiana through it's negligence—

THE COURT: New York has it's share of tragedies too.

THE COURT: A flood like Katrina?

MR. FOLKENFLIK: It occurred 20 years ago. It's not Katrina.

THE COURT: Sorry for the plaintiffs, but you have a problem with this judgment. Judgment comes with some baggage and that I cannot peel off it.

MR. FOLKENFLIK: The fact of the matter is while Your Honor may reach that decision that is not before the Court [27] today. Under Article 54 the limitations on the docketing of the judgment that we are asking Your Honor to cure, which has not been even objected to.

THE COURT: Why should I even bother with it? My recollection is that when you file a foreign judgment in the State of New York, you have to tell us if there is a stay of enforcement.

MR. FOLKENFLIK: And there is not. There is not.

THE COURT: What is this?

MR. FOLKENFLIK: It is not a stay of enforcement. It is currently, and I can hand up to Your Honor a dozen orders that—

THE COURT: "No judgment against the State, a state agency or political subdivision shall be exigible payable or paid except from funds appropriated therefore by the Legislature."

MR. FOLKENFLIK: That is not a stay.

THE COURT: We have a rule in [28] New York, if it walks like a duck and talks like a duck it is a duck.

It is a stay of enforcement. The only way you are going to get paid is if the Legislature writes you a check.

MR. FOLKENFLIK: That is not a stay of enforcement. In ten counties in New York it is executory—

THE COURT: Have you been able to execute on this judgment in the ten counties in Louisiana?

No. But you can execute on it here? When hell freezes over. What a waste of time this is.

MR. FOLKENFLIK: Your Honor, if Your Honor wishes an order to that effect, then we will see if the appellate court agrees.

THE COURT: How did you get this filed in the first place.

MR. FOLKENFLIK: It is required to be filed by law, Your Honor. All Your Honor has to do—

THE COURT: How do you get by [29] the requirement you have to affirm there is no stay?

How do you say there is no stay with this Constitution?

MR. FOLKENFLIK: There is no stay, Your Honor. If the Courts of Louisiana are trying to enforce their judgment, the fact that the Legislature wants to nullify—

THE COURT: Say that again. The State is trying to enforce its judgment?

MR. FOLKENFLIK: The Courts which issued the judgment, wish to have it enforced.

If they think it's a stay of this judgment, go to Louisiana and get Judge Chutz, who issued the judgment in accordance with Louisiana practice, to enter a stay.

They can't do it because he does not believe it.

THE COURT: Why do they have to do that, the Constitution already provides that you cannot be paid unless you get an [30] authorization from the Legislature.

MR. FOLKENFLIK: Because the judgment as a matter of Federal Law must be enforced in other states.

And the limitations on execution like that are not enforceable.

THE COURT: I am not going to waste my time, and this State's time on this kind of an application.

MR. FOLKENFLIK: Your Honor, could Mr. Edwards please make a statement to the Court?

THE COURT: No. This is a waste of time. This is frivolous.

The motion is denied as frivolous, and if it was not 911, I would hit you with sanctions, to file this kind of judgment without revealing to the Court there was at least a constitutional infirmity with this judgment.

MR. FOLKENFLIK: I did reveal it to the Court, and I put it in my papers. I revealed it to the Court, to Mr. Kibenik. I revealed it to everybody **[31]** involved. It is in the papers that were submitted to the Court. It is cited at pages two and three. We did not conceal it.

If I may say so, Your Honor—

THE COURT: Hang on. I was looking at your petition if that sets that forth. Now I am looking at the affirmation you filed in support of filing the judgment. Hold on let me read it.

MR. FOLKENFLIK: The affirmation—

THE COURT: Let me read it. You filed an affidavit which says enforcement of the judgment has not been stayed.

No place in your notice of petition or in you affidavit in the support of filing the judgment do you reveal the fact that the Constitution of the State of Louisiana stays enforcement of this judgment unless the Legislature authorizes payment.

[32] MR. FOLKENFLIK: I think Your Honor's characterization—

THE COURT: You filed a false affidavit, sir. You did.

MR. FOLKENFLIK: I revealed—Mr. Kubenik, the—

THE COURT: The requirement is that you file an affidavit that is not misleading.

MR. FOLKENFLIK: It is not misleading, Your Honor, because there is no stay in no court in Louisiana. It has been affirmed by the Louisiana Supreme Court.

THE COURT: It is my ruling it is a false affidavit, and it is my ruling this motion is denied as frivolous. I will also direct the clerk to vacate the filing of this judgment. It was improperly filed.

When you file a judgment you file it with a candid and honest affidavit that sets forth the circumstance. You are an attorney at law.

[33] MR. FOLKENFLIK: I am, Your Honor.

And I take that seriously.

THE COURT: So do I.

MR. FOLKENFLIK: And I revealed to the Court, and we filed the judgment. It was not docketed and my moving papers revealed and quote verbatim, the constitutional provision, which does not stay the enforcement of a judgment—

THE COURT: Sir, that was not in the affidavit in support of filing of the judgment. That was in the petition.

Nice argument. That is well done.

MR. FOLKENFLIK: Your Honor, may I make one statement?

THE COURT: No.

MR. FOLKENFLIK: In terms of the interest of New York.

THE COURT: No, we are done.

MR. FOLKENFLIK: Is Your Honor entering an order at this time.

THE COURT: This transcript will be so ordered.

[34] The Judgment Clerk is hereby directed to vacate the filing of this judgment against the State of Louisiana, and is instructed—no, the affidavit did state there was no stay, so that the clerk did his job as far as that is concerned.

But on the Court's own motion that judgment is vacated and this motion is denied as frivolous.

We are done.

* * *

It is hereby certified that the foregoing proceedings is a true and accurate transcript of the matter.

Millicent J. Angiulli
Official Court Reporter

So Ordered

CHARLES E. RAMOS
Charles E. Ramos
JSC

September 19, 2006

CONSTITUTION OF THE UNITED STATES OF AMERICA

ARTICLE IV. RELATIONS BETWEEN STATES

USCS Const. Art. IV, § 1

Sec. 1. Full Faith and Credit.

Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

USCS Const. Art. IV, § 2, Cl 1

Sec. 2, Cl 1. Privileges and immunities of citizens.

The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

CONSTITUTION OF THE STATE OF LOUISIANA OF 1974

ARTICLE XII. GENERAL PROVISIONS

La. Const. Art. XII, § 10 (2008)

§ 10. Suits against the state

A. *No Immunity in Contract and Tort.*. —Neither the state, a state agency, nor a political subdivision shall be immune from suit and liability in contract or for injury to person or property.

B. *Waiver in Other Suits.*. —The legislature may authorize other suits against the state, a state agency, or a political subdivision. A measure authorizing suit shall waive immunity from suit and liability.

C. *Limitations; Procedure; Judgments.*. —Notwithstanding Paragraph (A) or (B) or any other provision of this constitution, the legislature by law may limit or provide for the extent of liability of the state, a state agency, or a political subdivision in all cases, including the circumstances giving rise to liability and the kinds and amounts of recoverable damages. It shall provide a procedure for suits against the state, a state agency, or a political subdivision and provide for the effect of a judgment, but no public property or public funds shall be subject to seizure. The legislature may provide that such limitations, procedures, and effects of judgments shall be applicable to existing as well as future claims. No judgment against the state, a state

agency, or a political subdivision shall be exigible, payable, or paid except from funds appropriated therefor by the legislature or by the political subdivision against which the judgment is rendered.

LOUISIANA REVISED STATUTES

TITLE 13. COURTS AND JUDICIAL PROCEDURE

CHAPTER 32. PARTICULAR CLASSES OF ACTIONS AND CASES

PART 15. SUITS AGAINST STATE, STATE AGENCIES, OR POLITICAL SUBDIVISIONS

La. R.S. 13:5109 (2008)

§ 13:5109. Authority to compromise; judgment; notice of judgment; payments

A. In any suit filed against the state of Louisiana, a state officer, a state agency, a local public official or a political subdivision, the defendant, or the proper representative thereof, upon the advice and with the concurrence of the attorney general, district attorney, parish attorney, city attorney, or other proper official, as the case may be, may compromise and settle the claims presented in any such suit.

B. (1) If a judgment is rendered by a trial or appellate court or the supreme court against the state or a state agency in the amount of five hundred thousand dollars or more, and the attorney general is not an attorney of record in the suit, the clerk of the court shall also mail a notice of judgment to the attorney general, through the chief of the civil division, in accordance with Code of Civil Procedure Articles 1913, 2166, or 2167, as appropriate.

(2) Any judgment rendered in any suit filed against the state, a state agency, or a political sub-

division, or any compromise reached in favor of the plaintiff or plaintiffs in any such suit shall be exigible, payable, and paid only out of funds appropriated for that purpose by the legislature, if the suit was filed against the state or a state agency, or out of funds appropriated for that purpose by the named political subdivision, if the suit was filed against a political subdivision.

C. The governing authority of a parish or municipality, upon the advice and the concurrence of the district attorney, parish attorney, or city attorney of that parish or municipality or proper official as the case may be, may compromise or settle any claim against that parish or municipality without the necessity for the filing of a suit against the parish or municipality in the matter. Any such compromise settlement shall be exigible, payable, and paid only out of funds appropriated for that purpose by the governing authority of that parish or municipality. No claim in excess of ten thousand dollars may be compromised or settled as provided herein before ten days have elapsed after the publication of such proposed compromise or settlement in the official journal of the appropriate political subdivision.

CIVIL PRACTICE LAW AND RULES

ARTICLE 54. ENFORCEMENT OF JUDGMENTS ENTITLED TO FULL FAITH AND CREDIT

NY CLS CPLR § 5402 (2009)

§ 5402. Filing and status of foreign judgments

(a) Filing. A copy of any foreign judgment authenticated in accordance with an act of congress or the statutes of this state may be filed within ninety days of the date of authentication in the office of any county clerk of the state. The judgment creditor shall file with the judgment an affidavit stating that the judgment was not obtained by default in appearance or by confession of judgment, that it is unsatisfied in whole or in part, the amount remaining unpaid, and that its enforcement has not been stayed, and setting forth the name and last known address of the judgment debtor.

(b) Status of foreign judgments. The clerk shall treat the foreign judgment in the same manner as a judgment of the supreme court of this state. A judgment so filed has the same effect and is subject to the same procedures, defenses and proceedings for reopening, vacating, or staying as a judgment of the supreme court of this state and may be enforced or satisfied in like manner.

TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE

PART IV. JURISDICTION AND VENUE

CHAPTER 81. SUPREME COURT

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28 USCS § 1257

§ 1257. State courts; certiorari

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

(b) For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

No. 08-1212

Supreme Court, U.S.
FILED
MAY 29 2009
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

JEAN BOUDREAUX, AND THE VICTIMS OF THE FLOOD ON APRIL 6, 1983, ON THE TANGIPAHOA RIVER,

Petitioners,

v.

THE STATE OF LOUISIANA, DEPARTMENT OF TRANSPORTATION, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the New York Court of Appeals

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

James D. "Buddy" Caldwell
Louisiana Attorney General
Kyle Duncan
Appellate Chief
LOUISIANA DEPARTMENT OF JUSTICE
P.O. Box 94005
Baton Rouge, Louisiana 70804
225-326-6765

Richard W. Mark
Counsel of Record
E. Joshua Rosenkranz
Sarah E. Walcavich
ORRICK, HERRINGTON & SUTCLIFFE LLP
666 Fifth Avenue
New York, New York 10103-0001
212-506-5000

Counsel for Respondents

May 29, 2009

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QUESTION PRESENTED

Petitioners secured a judgment against Louisiana in Louisiana state court, but they could not enforce that judgment because Louisiana's limited waiver of sovereign immunity makes any such judgment contingent on an authorization by the Louisiana Legislature to pay the judgment. Petitioners had tried to bypass Louisiana's sovereign immunity, by seeking to enforce the judgment in New York state court. They invoked the Full Faith and Credit Clause, which requires that the New York courts accord Louisiana judgments *the same* credit Louisiana courts would accord them. Was the New York Court of Appeals correct in holding that the Full Faith and Credit Clause does not require the New York courts to accord the Louisiana judgment more credit than the Louisiana courts would?

LIST OF PARTIES AND RULE 29.6 STATEMENT

All parties to the proceedings in the New York Court of Appeals are listed in the caption.

CORPORATE DISCLOSURE STATEMENT

Not applicable.

BRIEF FOR THE RESPONDENTS IN OPPOSITION

INTRODUCTION

Petitioners are Louisiana residents who obtained a final money judgment in a tort suit filed against the State of Louisiana, in Louisiana state court. No court in Louisiana can legally enforce that judgment because Louisiana law prohibits a court from enforcing a judgment against the State unless the Louisiana Legislature appropriates funds from the State's treasury to pay it – a step the Louisiana Legislature has declined to take.

In an effort to bypass the limitations Louisiana has placed on its waiver of sovereign immunity, petitioners turned to the New York courts to enforce a Louisiana judgment that no Louisiana court would enforce. They insist that the Full Faith and Credit Clause somehow requires a New York court to accord *more* faith and *more* credit to the Louisiana judgment than the Louisiana courts do. In particular, they insist that the Clause requires New York courts to give full faith and credit to the Louisiana judgment, but to give no faith and no credit to the Louisiana constitutional and statutory limitations that made the judgment contingent.

No court anywhere in the country has ever reached such a conclusion. The New York Court of Appeals broke no new ground when it unanimously rejected petitioners' position, App. at 6a – a position that the trial court dismissed as "frivolous," *id.* at 46a. The New York Court of Appeals applied settled constitutional principles to the idiosyncrasies of

Louisiana law. This Court should deny the petition.

STATEMENT

The Petitioners Obtain a Judgment in Louisiana

In April 1983, floodwaters damaged several hundred homes and businesses in Tangipahoa Parish, Louisiana. App. at 2a. Petitioners, Louisiana residents harmed by the flood, filed a class action suit blaming the Louisiana Department of Transportation's negligent construction of a bridge. *Id.* After prevailing in the trial court and appellate courts, Petitioners obtained a final judgment in the Louisiana Court of Appeal. *Id.* The Louisiana Supreme Court denied a writ of certiorari. *Boudreaux v. Louisiana,* 05-2242 (La. 2/17/06); 924 So.2d 1018.

Louisiana law considers this judgment "final." But it is nevertheless unenforceable in any Louisiana court. Louisiana waives sovereign immunity for tort suits, but only to a limited degree. The Louisiana Constitution provides that a money judgment against the State cannot be paid "except from funds appropriated therefor by the legislature or by the political subdivision against which the judgment is rendered." La. Const. art. XII, § 10(c).

Petitioners have petitioned the Louisiana Legislature to appropriate funds for payment of the judgment. App. at 11a. The Legislature has declined to appropriate the funds. Petitioners have also attempted to enforce the Louisiana judgment by docketing it in eighteen Louisiana parishes. App. at 2a. Docketing, however, is a futility in this case because the State's sovereign immunity waiver

makes legislative appropriation the exclusive means of enforcement. No court in Louisiana will enforce the judgment.

Petitioners Unsuccessfully Attempt to Enforce the Louisiana Judgment in New York

Petitioners then turned to the New York courts, in hopes of persuading them to enforce a Louisiana judgment that no Louisiana court will enforce. In August 2006, petitioners attempted to docket their Louisiana judgment in the office of the County Clerk of New York County pursuant to New York Civil Practice Law & Rules ("CPLR") Article 54 ("Enforcement of Judgments Entitled to Full Faith and Credit"). App. at 2a. Their plan was to find assets of Louisiana in New York and to execute on them using the CPLR procedure – even though the Louisiana Legislature did not take the steps necessary to make the judgment enforceable and even though the limitations on Louisiana's sovereign immunity waiver insulated those assets. *Id.*

Noting this "infirmity," the New York trial court precluded petitioners from docketing the judgment. App. at 42a, 48a. The court reasoned that the provision of the Louisiana Constitution requiring legislative approval of any judgment effectively stayed enforcement of the judgment. App. at 44a-47a.

On appeal, the Appellate Division affirmed. App. at 16a. The Appellate Division recognized that the Louisiana judgment was a contingent award of damages and should not be considered an enforceable "judgment" within the meaning of CPLR Article 54. App. at 14a. The court refused to accord

the judgment greater effect in New York than it would have in Louisiana. *Id.*

The New York Court of Appeals unanimously affirmed. It reasoned that New York courts are not required to enforce a money judgment against Louisiana that Louisiana's own courts are legally barred from enforcing. App. at 2a. The Court of Appeals noted that Louisiana courts know that a judgment creditor of the State may be left unable to collect when the Legislature refuses to appropriate the funds necessary to satisfy a judgment. App. at 5a. It further observed: "In seeking to enforce the Louisiana judgment in New York, plaintiffs attempt to circumvent Louisiana's clear mandate that no judgment rendered against it shall be paid unless its Legislature appropriates funds." App. at 4a. The Full Faith and Credit Clause, the court concluded, does not override this mandate: "what the Full Faith and Credit Clause requires is that a court provide a foreign judgment with the same credit, validity, and effect it would have in the state that pronounced it." App. at 4a-5a. The only way to give effect to Louisiana law, the Court of Appeals concluded, was to refuse to enforce the judgment in New York exactly as a Louisiana court would. App. at 5a-6a.

The Court of Appeals further held that the doctrine of comity did not require enforcement of the Louisiana judgment. App. at 6a. To the contrary, comity counseled that the Court of Appeals "defer to the Constitution of Louisiana and the public policy embodied within the statute enacted by its legislature," *id.*, which, in this case meant that the judgment could not be enforced except by an appropriation of the Louisiana legislature.

REASONS FOR DENYING THE PETITION

This Court should deny certiorari for two reasons. First, by petitioners' own admission, this case involves the application of "settled law" to a peculiar set of facts. Pet. at 16. Petitioners do not even try to point to any opinion from any court that reached the opposite conclusion on similar facts. There are no directly contrary holdings because Louisiana's limitation on enforcement of judgments against the State is virtually unique. *See infra* Point I. Second, the New York Court of Appeals, applying long-settled principles of law, reached the correct conclusion. *See infra* Point II.

I. THE LOWER COURTS ARE NOT SPLIT AS TO HOW THE FULL FAITH AND CREDIT CLAUSE APPLIES TO THE UNIQUE FACTS OF THIS CASE.

The petition's central theme is that the Court of Appeals' ruling is "completely inconsistent with over a century of settled full faith and credit law as established and re-emphasized by this Court time and again." Pet. at 4; *see id.* at 16. Petitioners do not suggest that the New York Court of Appeals' holding conflicts directly with the holding of the highest court of any other state, or with the holding of any federal court of appeals, on similar facts.

Specifically, petitioners do not cite a single case, like this one, with the following elements: (1) a state court in State X renders a judgment; (2) the law of State X provides, as a matter of sovereign immunity, that the judgment cannot be enforced against State X; and (3) a court in State Y nevertheless enforces the judgment, in defiance of State X's sovereignty. We are unaware of any case that so holds. In fact,

we are unaware of any case – on either side of ledger – that presents this peculiar scenario.

The reason is plain. Louisiana's waiver of sovereign immunity is virtually unique among the states. Most states that waive sovereign immunity grant state courts the power to enforce judgments against the state.[1] Some grant state courts the power to enforce judgments, but dictate from where the funds are to be paid.[2] Others grant state courts the power to enforce judgments, but impose upon the state legislature a legal obligation to appropriate the funds, so that the funds are properly budgeted and accounted for.[3] But so far as we have been able to ascertain only one other state – Hawaii – that takes the same approach as Louisiana, in making the enforceability of the judgment contingent on legislative authorization. *See* Haw. Rev. Stat. § 662-11 (2008) (larger "[c]laims arbitrated, compromised, or settled . . . shall be paid only after funds are appropriated by the legislature for the payment of those claims").

If, as petitioners insist, the law has been "settled" for a century, then this Court's intervention is unnecessary. By petitioners' own terms, there is no

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[1] *See, e.g.*, Idaho Code Ann. § 6-922 (2009); Iowa Code § 669.11 (2009); Me. Rev. Stat. Ann. Court Procedure – Civil 14 § 8115 (2009); Minn. Stat. § 3.736 (2009); Neb. Rev. Stat. § 13-918 (2008); N.J. Stat. Ann. § 59:12-1 (2009); Nev. Rev. Stat. § 41.037 (2008); S.D. Codified Laws § 21-32-14 (2008).

[2] *See, e.g.*, Idaho Code Ann. § 6-922 (2009); Iowa Code § 669.11 (2009); Me. Rev. Stat. Ann. Court Procedure – Civil 14 § 8115 (2009); Minn. Stat. § 3.736 (2009); Nev. Rev. Stat. § 41.037 (2008).

[3] *See, e.g.*, Neb. Rev. Stat. § 13-918 (2008); N.J. Stat. Ann. § 59:12-1 (2009); S.D. Codified Laws § 21-32-14 (2008).

compelling reason for this Court to assume the unaccustomed role of court of errors to correct a supposed misapplication of "settled" principles to a fact scenario that has never before arisen, and might never again arise.

II. THE COURT OF APPEALS' HOLDING IS CONSISTENT WITH ESTABLISHED DOCTRINE ON THE FULL FAITH AND CREDIT CLAUSE.

Petitioners are correct when they note that the Full Faith and Credit Clause doctrine applicable here is "settled." *See* Pet. at 16. They are just wrong about how those settled principles apply to the facts of this case. The truth is that the New York Court of Appeals followed settled law, and petitioners are the ones advocating a radical – indeed, unprecedented – departure from long-accepted constitutional doctrine.

A. The Settled Rule Is that a State Court Need Not Give Greater Credit to the Judgment Rendered By a Sister State than Would the Courts in the Rendering State.

The United States Constitution provides that "Faith and Credit shall be given in each State to the public Acts, Records and Judicial Proceedings of every other State." U.S. Const. art. IV, § 1. The purpose of this clause was to avoid conflicts created by courts in different states adjudicating the same matters, and to "transform[] an aggregation of independent, sovereign States into a nation." *Sherrer v. Sherrer*, 334 U.S. 343, 355 (1948). The operative principle has been the same not just for a century, but for nearly *two* centuries: "the judgment

of a state court should have *the same* credit, validity and effect, in every other court of the United States, which it had in the state where it was pronounced." *Underwriters Nat'l Assurance Co. v. N.C. Life & Accident & Health Ins. Guar. Ass'n,* 455 U.S. 691, 704 (1982) (emphasis added) (citing *Hampton v. McConnel,* 16 U.S. (3 Wheat.) 234, 235 (1818)).

This Court has never read this clause to require an enforcing state to give a judgment *greater* effect than it would have in the courts of the rendering state. To the contrary, this Court has held that under the Full Faith and Credit Clause, "a judgment has no constitutional claim to a more conclusive or final effect in the State of the forum than it has in the State where rendered." *New York v. Halvey,* 330 U.S. 610, 614 (1947). Therefore, "the State of the forum has at least as much leeway to disregard the judgment, to qualify it, or to depart from it as does the State where it was rendered." *Id.* at 615.

B. The New York Court of Appeals Faithfully Followed the Settled Rule By Declining to Give the Louisiana Judgment Greater Credit Than Louisiana Courts Would Accord It.

Following this settled rule, the New York Court of Appeals unanimously concluded that the New York courts are not required to enforce a Louisiana judgment that the Louisiana courts, themselves, would be constitutionally barred from enforcing, because the judgment was subject to the condition that payment could be made only by specific legislative appropriation. That conclusion was correct.

It is undisputed that petitioners' judgment is

judicially unenforceable in Louisiana as a matter of state law. Pet. at 4. The constitutional provision, quoted above, is unequivocal that:

> No judgment against the state, a state agency, or a political subdivision shall be exigible, payable, or paid except from funds appropriated by therefor by the legislature or by the political subdivision against which the judgment is rendered.

La. Const. art. XII, § 10(c). There is no serious question that this provision limits the State's waiver of its sovereign immunity.[4]

The statute implementing Louisiana's constitutional sovereign immunity waiver explains why the State thought it important to impose the limitation:

> (1) That judgments against public entities have exceeded ability to pay on current basis.
>
> (2) That the public fisc is threatened by these judgments to the extent that the general health, safety and welfare of the citizenry may be threatened.

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[4] At points petitioners seem to dispute that this condition represents a limitation on the scope of Louisiana's waiver of sovereign immunity. *See* Pet. at 19-20. But whether the New York Court of Appeals correctly interpreted a provision of the Louisiana Constitution as a limitation on the waiver of sovereign immunity is a state law question not worthy of this Court's attention.

> (3) That the limitations set forth in this Section are needed to curb the trend of governmental liability abuses, to balance an individual's claim against the needs of the public interests and the common good of the whole society, and to avoid overburdening Louisiana's economy and its taxpaying citizens with even more new and/or increased taxes than are already needed for essential programs.

La. Rev. State. Ann. § 13:5106(F) (2008).

Louisiana courts have consistently recognized the Legislature's exclusive control over the decision to allow the enforcement of a money judgment against the State. As the Supreme Court of Louisiana recently explained: "the judicial branch is empowered to render judgments against the state. However, the constitution does not provide the judiciary with the ability to execute those judgments. The constitution reserves that power to the legislature." *Newman Marchive P'ship Inc. v. City of Shreveport*, 07-1890, p. 4 (La. 4/8/08); 979 So.2d 1262, 1265 (internal citations omitted).[5]

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[5] *See also Henderson v. Bigelow*, 07-1441, p. 16 (La. App. 4 Cir. 4/9/08); 982 So.2d 941, 950 ("The constitution vests in the legislature—*not the judiciary*—the discretionary function of appropriating public funds.") (emphasis in original); *Hoag v. State*, 04-0857, p. 8 (La. 12/1/04); 889 So.2d 1019, 1025 ("Although we recognize that plaintiffs are entitled to payment of the judgment, a writ of mandamus directing the legislature to appropriate funds is an impermissible usurpation of legislative power by the judiciary. So finding we are compelled to exercise judicial restraint and refrain from encroaching upon the constitutional delegation of power to the legislative branch by compelling it to appropriate funds to pay the *Hoag I* judgment.").

Thus, while Louisiana law may refer to a court's judgment against the State as "final," *see* La. Code Civ. Proc. Ann. art. 1841 (2003) ("A judgment that determines the merits in whole or in part is a final judgment."), the consequence of these constitutional and statutory provisions is to make that judgment contingent: It is unenforceable unless and until the Legislature embraces it and appropriates money to cover it.

In insisting that the New York courts must nevertheless enforce a Louisiana judgment that Louisiana courts, themselves, are prohibited from enforcing, petitioners are urging a drastic departure from settled law. They are arguing that New York courts must give *more* faith and *more* credit to a Louisiana judgment than the Louisiana courts themselves would accord it. They are insisting that the New York courts give full credit to the Louisiana judgment, but *no* credit to the State's constitutional limitation on its own waiver of sovereign immunity.

C. Petitioners' Arguments, and Analogies to Other Lines of Cases, Are Unpersuasive.

Unable to point to any case with facts even close to the facts of this case, petitioners invoke several lines of cases that have no bearing on the question at issue here. We address each argument in turn.

"Final" judgments are preclusive. Petitioners' central argument revolves around splicing a part of Louisiana substantive law (the conditional waiver of sovereign immunity that allows litigation of the tort claim) to parts of New York procedural law (providing for the enforcement of foreign judgments). Their argument goes something like this: *Louisiana*

law refers to the judgment as "final," even if it is contingent on legislative authorization. Pet. at 17-18 (quoting La. Code Civ. Proc.. art. 1841). *New York* law says that "final" judgments from sister states must be docketed. Pet. at 6 (citing CPLR art. 54). Ergo, Louisiana's final judgment must be docketed under New York law.

The problem with this analysis is that New York's highest court, in this case, interpreted the New York statute *not* to require any such thing, because Louisiana's judgment was not "final" within the meaning of New York's enforcement statute. *See* App. at 6a. Petitioners object that this conclusion is incorrect. But it is not up to this Court to override state courts on their interpretation of their own statutes.

So petitioners then try to federalize the requirement. They do so mainly by snatching quotes from various cases out of context. For example, they quote (Pet. at 15) from cases to the effect of: "A *final* judgment in one State . . . qualifies for recognition throughout the land." *Baker v. Gen. Motors Corp.*, 522 U.S. 222, 233 (1998) (emphasis added; other citations omitted). But those cases all involved judgments that were "final," in every sense of the term. Those cases did not involve the oddity of a state judgment that might have been "final" in form, but contingent in fact. So whatever they said about "truly" final judgments has no bearing on Louisiana's unique type of judgment in a case applying the State's sovereign immunity waiver. But, in any event, the cases cited in that passage were not about the requirement that courts enforce the judgments of sister states. They were about the completely different, and irrelevant, principle of

claim preclusion – that the final determination of any issue fully and fairly considered must be given preclusive effect.[6] Because Louisiana did not try to *re*litigate any facts or law before the New York courts, the preclusion cases are irrelevant.

Courts of one state do not recognize a sister state's sovereign immunity. Citing *Nevada v. Hall*, 440 U.S. 410 (1979), and two New York State cases,[7] petitioners contend that New York courts should not give effect to Louisiana's limitation on sovereign immunity that allows a judgment against the state to be enforced by specific legislative appropriation. Pet. at 19-20. *Hall* and the two New York cases, however, involved transactions that the defendant state had voluntarily conducted in the forum state, and litigation in the forum state where jurisdiction was otherwise established over the defendant state. This case is totally different. Petitioners obtained a judgment against Louisiana

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[6] *See Baker*, 522 U.S. at 233 (1998) ("For claim and issue preclusion (res judicata) purposes, in other words, the judgment of the rendering State gains nationwide force."); *Durfee v. Duke*, 375 U.S. 106, 115 (1963) ("The question remains whether, once a matter has been fully litigated and judicially determined, it can be retried in another State in litigation between the same parties. Upon the reason and authority of the cases we have discussed, it is clear that the answer must be in the negative."); *Underwriters Nat'l Assurance Co. v. N.C. Life & Accident & Health Ins. Guar. Ass'n.*, 455 U.S. 691, 710 (1982) ("The issue having been fully and fairly considered by the Indiana court, its final determination was entitled to full faith and credit in North Carolina).

[7] *Deutsche Bank Sec., Inc. v. Montana Bd. of Inv.*, 7 N.Y.3d 65 (2006) and *Ehrlich-Bober & Co., Inc. v. Univ. of Houston*, 49 N.Y.2d 574 (1980).

in that State's own courts and pursuant to that State's sovereign immunity waiver, concerning conduct that all occurred in Louisiana. The conditions attached to Louisiana's sovereign immunity waiver are baked into the judgment. This case does not involve litigation against Louisiana that properly occurred in the courts of New York or some other state. Nothing happened outside of Louisiana here except for petitioners' carrying a foreign judgment to New York. The Full Faith and Credit clause requires New York courts to honor Louisiana law, not to cast it aside.

"Enforcement measures" follow the forum. Petitioners next try another way to federalize the rule that New York cannot enforce Louisiana limitations on enforcement of Louisiana judgments. They quote (Pet. at 22) another snippet from the same case, to the effect that: "Enforcement measures do not travel with the sister state judgment as preclusive effects do; such measures remain subject to the evenhanded control of forum law." *Baker*, 522 U.S. at 235 (citing *Bailey v. Cohen*, 38 U.S. (13 Pet.) 312, 325 (1839)). Petitioners interpret this proposition as a command that New York courts must completely ignore the legal constraints of Louisiana law.

As petitioners confirm with their numerous citations, the classic example of this rule is where a plaintiff secures a judgment in State X, but does not succeed in collecting using methods available in State X – so the plaintiff files the judgment in State Y, which has other enforcement tools. Petitioners' particular example are cases in which the rendering state does not allow wage garnishment but the

enforcing state does.[8] These cases hold that just because State X does not allow its court to garnish wages to collect an otherwise enforceable judgment does not mean that State Y cannot provide for that vehicle of enforcement.

That is a completely different scenario. In those cases, there was no question that State X's judgment was enforceable in State X. There was no bar to collecting the judgment. There was nothing in the law of State X that made the judgment contingent on some future state action. And there was certainly nothing in the law limiting the waiver of sovereign immunity. Not so here, where: (1) the New York courts are recognizing a condition inherent in the Louisiana judgment and inextricably tied to Louisiana's sovereign immunity; and (2) Louisiana law emphatically does not treat the judgment as enforceable – by any means, except legislative authorization.[9]

Privileges and Immunities Clause. Finally,

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[8] *See Morris Plan Indus. Bank v. Gunning*, 67 N.E.2d 510, 513 (N.Y. 1946) (determining New York court could garnish wages of a nonresident employed by a corporation doing business in New York to enforce judgment rendered in Pennsylvania); *People's Nat'l Bank v. Hitchcock*, 428 N.Y.S.2d 850, 852 (Sup. Ct. 1980) (same); *see also Downs v. Am. Mut. Liab. Ins. Co.*, 243 N.Y.S.2d 640, 645 (App. Div. 1963) (determining New York resident could use New York judgment enforcement procedures to garnish wages of a nonresident employed in foreign state to enforce judgment rendered in New York).

[9] Once again, much of petitioners' argument here seems to revolve around trying to prove that the New York Court of Appeals misapplied New York law – an issue that is neither within this Court's domain nor worthy of this Court's attention. *See* Pet. at 24-26 (quoting a New York case at length, and citing six others).

petitioners assert that the Privileges and Immunities Clause requires reversal because "New York may not constitutionally close the doors of its courts to out of state citizens when they are freely open to citizens of New York." Pet. at 27. The short answer is that petitioners never raised the Privileges and Immunities Clause in any of the courts below, and cannot raise it for the first time now. *See Youakim v. Miller,* 425 U.S. 231, 234 (1976) ("Ordinarily, this Court does not decide questions not raised or resolved in the lower court.").

In any event, petitioners are wrong. As petitioners correctly point out, the Privileges and Immunities Clause requires only that "any policy the State may choose to adopt must operate in the same way on its own citizens and those of other states." Pet. at 28 (quoting *Chambers v. Baltimore & Oh. R.R. Co.*, 207 U.S. 142, 149 (1907)). New York law *does* apply the same to both New York *citizens* and Louisiana *citizens*. If a New York citizen had secured a judgment against Louisiana in Louisiana state court, he, too, would be unable to enforce the judgment in New York, absent an appropriation from the Louisiana Legislature. To be sure, New York law treats Louisiana *judgments* differently from New York *judgments*, but that is because Louisiana law says Louisiana judgments *are* different.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

Richard W. Mark
Counsel of Record
E. Joshua Rosenkranz
Sarah E. Walcavich
ORRICK, HERRINGTON &
SUTCLIFFE LLP
666 Fifth Avenue
New York, NY 10103-0001
(212) 506-5000

James D. "Buddy" Caldwell
Louisiana Attorney General
Kyle Duncan
Appellate Chief
Louisiana Department of Justice
P.O. Box 94005
Baton Rouge, LA 70804
(225) 326-6765

Counsel for Respondents

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IN THE

Supreme Court of the United States

JEAN BOUDREAUX, and the victims of the Flood on April 6, 1983, on the Tangipahoa River,

Petitioners,

—v.—

THE STATE OF LOUISIANA, DEPARTMENT OF TRANSPORTATION, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

MAX FOLKENFLIK, ESQ.
Counsel of Record
FOLKENFLIK & MCGERITY
1500 Broadway, 21st Floor
New York, New York 10036
(212) 757-0400

BYARD EDWARDS, JR., ESQ.
1090 West Pine Street
Ponchatoula, Louisiana 70454
(985) 386-3148

HENRY G. TERHOEVE, ESQ.
GUGLIELMO, MARKS, SCHUTTE, TERHOEVE & LOVE
320 Somerulos Street
Baton Rouge, Louisiana 70821
(225) 938-5586

Attorneys for Petitioners

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INTRODUCTION

The Brief in Opposition to the Petition raises distinctions between this case and other precedent, and even suggests that the case is not worthy of a writ of *certiorari* because almost all states, other than Louisiana, are required by statute to honor the obligations imposed by final judgments. While such arguments are revealing, they scarcely suggest that the disregard of final judgments will not be a recurring problem. Louisiana itself has already given rise to similar cases is a likely incubator of future cases.[1] In all events, the Brief in Opposition does little to address,

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[1] Louisiana state agencies and political subdivisions are subject to the same constitutional scheme on the enforcement of judgments through appropriations only. La. Const., Art. XII, §10(A), La. Const., Art. XII, §10(C). Like the State, Louisiana political subdivisions apparently are starting to ignore final judgments which they do not find convenient. *The Newman Marchive Partnership, Inc. v. City of Shreveport*, 962 So. 2d 1075, 1077-1078 (La 2007); *Newman Marchive P'ship v. Hightower*, 2009 U.S. Dist. LEXIS 8945 (W.D. La. Feb. 6, 2009). Refusals to satisfy judgments have not been limited to Louisiana. *Mandel v. Myers*, 29 Cal. 3d 531 (1981) (refusal to pay court awarded attorney's fees).

let alone illuminate, the constitutional issues presented by this case.

The important constitutional issues of federalism represented by this case could not be more starkly presented: First, where a state has given its legislature exclusive control over payment of final judgments against the state, and the legislature refuses to appropriate funds to pay that final judgment, what action should a sister state take when enforcement of that final judgment is sought in the sister state?

Several hundred years of uninterrupted Full Faith and Credit Law and several hundreds of years of constitutional law regarding enforcement of sister state judgments require that the judgment be enforced in the enforcing state in accordance with its enforcement procedures. *See*, Petition at 14-17, 21-26, *infra* at 8. Those hundreds of years of constitutional law precedent should have been adhered to by the New York Court of

Appeals, but instead were disregarded. Even were an exception to uniform prior rulings somehow justifiable, the question of whether to create a new rule inconsistent with this Court's uniform precedent, and the contours of such a rule, are matters of utmost significance to this Court, and should be ruled upon by this Court.

Second, where a state legislature or executive refuses enforcement of a final judgment, should a sister state enforce the judgment irrespective of the legislative/executive objection? Again, the command of the Full Faith and Credit law is "exacting," *Baker by Thomas v. GMC,* 522 U.S. 222, 232-33 (1998) and requires any final judgment of a sister state to be enforced. *See*, Petition at 14-17, *infra* at 9-10. The adherence to the rule of law requires no less.

Third, in deciding whether to enforce a foreign judgment, may a state apply a "comity" test, which

turns upon whether the judgment debtors were citizens of Louisiana or citizens of New York? Prior Full Faith and Credit cases expressly reject the notion that enforcing states have any flexibility in deciding whether to enforce a final judgment based on comity. *Estin v. Estin*, 334 U.S. 541, 545-46 (1948) ("Full Faith and Credit Clause . . . substituted a command for the earlier principles of comity"). *See*, Petition at 14-15, 26, *infra* at 11-12. Such an approach also is a clear violation of the Privileges and Immunities Clause of Article 4, Section 2 of the United States Constitution. *See*, Petition at 27-30, *infra* at 11-13. Contrary to defendants' assertion, that issue was raised by petitioner, both in the intermediate appellate court and in the New York Court of Appeals. *See*, Add. 1-4, and *infra*, at 9-10.

We address the issues raised by the Brief in Opposition more fully below.

1. The Brief in Opposition, like the Court of Appeals below, confuses Limitations on Enforcement of a Judgment with Limitations of the "Effect" of the Judgment for Full Faith and Credit Purposes

The Court of Appeals ruled that enforcement was excused in New York because the limitations on enforcement contained in Louisiana Constitution Art. XII §10(C) limit the "effect" of the Louisiana Judgment at issue, *see* Opinion of Court of Appeals, at 5a-6a.

There is no question that the Louisiana judgment is final under Louisiana law for *res judicata* purposes, *see* Petition at 17-21. The Brief in Opposition admits as much. Brief in Opp. at 4. The problem, as the New York Court of Appeals and the Brief in Opposition note, is that the sole means of enforcement is a legislative appropriation and the Louisiana legislature has refused to appropriate funds to pay the judgment. *See*, Brief in Opp. at 4. The Court of Appeals incorrectly concluded that as a result the "effect" of the judgment was limited

by the restriction on enforcement. *See,* Opinion of Court of Appeals at 5a-6a.

As we pointed out in the Petition at 16-17, however, the "same effect" language in the Full Faith and Credit cases refers to the same preclusive effect for *res judicata* purposes. *See, e.g., Baker by Thomas v. GMC,* 522 U.S. 222, 232-233 (1998); *Durfee v. Duke,* 375 U.S. 106, 109 (1963). For Full Faith and Credit purposes, it matters not at all that Louisiana law severely restricts the enforcement procedures available for final judgments against the state. As Justice Ginsburg stated in *Baker by Thomas*, "enforcement measures do not travel with the sister-state judgment as preclusive effects do . . ." *Id* at 358. Enforcement limitations, whatever their scope, are not relevant to the "preclusive effect" of the judgment, which is the only "effect" relevant to Full Faith and Credit analysis.

As a matter of Full Faith and Credit law, the enforcement limitations with respect to claims against the State of Louisiana are no more "baked" into the judgment itself (to use the Brief in Opposition's colorful phrase), than any other enforcement limitations are "baked" into any other judgments. Nor do they have any relevance for Full Faith and Credit purposes.

We do not argue, as the Brief in Opposition claims at 16, that this rule is a constitutional "command that New York courts must completely ignore the legal constraints of Louisiana law." (emphasis supplied). States could well adopt procedures that give effect to foreign state enforcement privileges and burdens. However, that is not what New York law does or what the New York Court of Appeals found in this case.

There can be no dispute that under New York law all foreign judgments which are entitled to Full

Faith and Credit, are enforced in accordance with New York law. *See*, New York C.P.L.R. Article 54; *Morris Plan Industrial Bank v. Gunning*, 295 N.Y. 324, 331-32 (1946); Petition at 24-26 and cases cited. As the decision below makes clear, the Court of Appeals denied enforcement of the judgment because of its misapplication of the Full Faith and Credit Clause, and not because of any general application of foreign enforcement procedures.

2. **Even if the State Legislature Attempts to Nullify the Effect of a Final Judgment, the Full Faith and Credit Clause Requires Sister States to Recognize the Judgment**

Where a state legislature, as here, seeks to nullify a final judgment and enforcement is sought in a sister state, under existing law of this Court, the enforcing state has only one choice: the final judgment of the Court must be enforced. As Justice Ginsburg stated in *Baker by Thomas*, "regarding judgments,

however, the Full Faith and Credit obligation **is exacting**" and once a final judgment is rendered, it "qualifies for recognition throughout the land." *Baker by Thomas v. GMC*, 522 U.S. 222, 232-33 (1998) (emphasis supplied). *See, also, Franchise Tax Bd. v. Hyatt,* 538 U.S. 488, 494 (2003). The New York Court of Appeals itself stated an earlier opinion it clearly stated: "States enjoy no . . . flexibility in deciding whether they will recognize foreign judgments." In *Farmland Dairies v. Barber*, 65 N.Y. 2d 51, 58 (1985). "The Full Faith and Credit Clause . . . substituted *a command* for the earlier principles of comity." *Estin v. Estin*, 334 U.S. 541, 545-46 (1948) (emphasis supplied).

Final judgments by sovereign courts with jurisdiction should be enforced, even where the legislature or the executive may prefer not to enforce it. That principle was established at the very formation of this Republic in *Marbury v. Madison*, 5 U.S. 137 (1803).

Justice Marshall referenced the historic precedent of compliance with court's judgments, well established even before 1803, and noted that the king himself "never fails to comply with the judgment of his court." *Id.* at 163. Justice Marshall forcefully concluded that a government that ignores judicial decisions does not deserve to be called "a government of laws and not of men." *Id.* There is no reason in law or in policy to defer to the inaction of the Louisiana legislature which seeks to undermine a final judgment.

3. The Court of Appeals Ruling Must be Overturned because it is clearly based on Applying a Different Rule with Respect to the Enforcement in New York of Louisiana Judgments depending on whether they were Obtained by New York Citizens or Citizens of Louisiana

The Court of Appeals is additionally in error because it clearly applied a different rule on the enforcement of a final judgment by these plaintiffs because they were citizens of Louisiana and not of New

York. The failure to apply the same remedies in favor of New York citizens and Louisiana citizens on enforcement of judgments in New York is undisputedly a violation of the Privileges and Immunities Clause, Article IV, Section 2 of the United States Constitution. *See,* Petition at 27-30.

Contrary to the arguments in the Brief in Opposition, the Privileges and Immunities argument was raised both in the Appellate Division, *see,* Add. 3-4, and in the Court of Appeals, *see,* Add. 1-2. It was also discussed in oral argument in both cases.

The Brief in Opposition is also incorrect in its assertion that the Court of Appeals decision suggested neither New Yorkers nor Louisiana citizens could enforce a Louisiana judgment against the State of Louisiana. Brief in Opp. at 18. To the contrary, the decision below expressly held that "there is no compelling interest in providing New York as a forum

for addressing this case" and that "the rights of New Yorkers are not involved in this matter at all." 6a. It is undisputable that the New York Court of Appeals was operating under the misunderstanding that the Privileges and Immunities Clause would allow it to enforce final judgments in favor of New Yorkers differently from the enforcement of final judgments in favor of Louisiana citizens.

That approach is contrary to the constitutional command that "citizens of each state shall be placed on the same footing as citizens of other states." *Lunding v. New York Tax Appeals, Tribunal*, 552 U.S. 287, 296 (1998) "any policy the State may choose to adopt must operate in the same way as its own citizens and those of other states." *Chambers v. Baltimore & O.R. Co.*, 207 U.S. 142, 148-49 (1907). *See, also*, Petition at 27-30.

4. There is No Basis in the Concept of Sovereign Immunity to Deny Enforcement of the Louisiana Judgment

While the Court of Appeals did not rely on Louisiana sovereign immunity to support its decision on the Brief in Opposition, it spends much of its argument asserting that denial of enforcement is justified on that ground alone. The argument is in error under Louisiana law, the rulings of this Court and New York law.

As a matter of Louisiana constitutional law, the waiver of sovereign immunity contained in Article XII, Section 10(A) of the Louisiana Constitution is an unequivocal rejection of the doctrine of sovereign immunity. *Jones v. Baton Rouge-Parish of East Baton Rouge*, 388 So.2d 737, 740 (La. 1980), the limitation on enforcement in Article XII, Section 10(C) is not a restriction or limitation on the sovereign immunity waiver, but governs the "method of payment" only.

Holly & Smith Architects, Inc. v. St. Helena Congregate Facility Inc. and St. Helena Parish Hospital, 943 So. 2d 1037, 1045-1046 (La. 2006). *See, also*, Petition at 19-21.[2]

Deference to Louisiana's sovereign immunity is not required by the decisions of this Court. *See, Nevada v. Hall*, 440 U.S. 410 (1979). Nor would New York recognize Louisiana's claim of sovereign immunity in its courts. *Ehrlich-Bober & Co., Inc. v. University of Houston*, 49 N.Y.2d 574 (1980); *Deutsche Bank Sec., Inc. v. Montana Bd. of Investments*, 7 N.Y.3d 65, 72 (2006).

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[2] The Brief in Opposition also cites La. Rev. Stat. §13:5106 (E) (2008). However, that provision, which puts certain recovery caps per individual on claims against the state, was passed long after the commencement of the underlying lawsuit. In all events, there are no limitations in that section that have any bearing on this case.

CONCLUSION

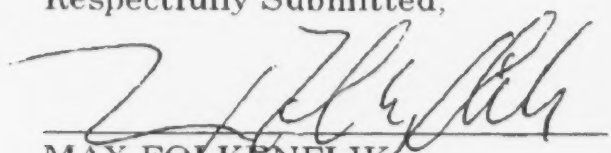
There has never been any doubt that the rule of law is undermined "if the laws furnish no remedy for the violation of a vested legal right." *Marbury v. Madison*, 5 U.S. 137, 163 (1803). In this case, the remedy has been abrogated by the New York Court of Appeals by an inappropriately parochial approach which focused on the rights of New York citizens, with too little regard for the constitutional rights of Louisiana citizens which *all states* are required to recognize and enforce.

The clear disregard by the New York Court of Appeals of the Constitutional requirements of Full Faith and Credit recognition and equal application of all Privileges and Immunities are more than enough reason to grant *certiorari* and reverse in this case. The ruling below perpetuates a grave injustice by continuing to deny compensation to 1,286 victims of a

flood caused by Louisiana's negligence in 1983 for which the State has been found liable in a final judgment. That fact makes the need for this Court's review even more compelling.

Dated: New York, New York
June 19, 2009

Respectfully Submitted,



MAX FOLKENFLIK
Counsel of Record
FOLKENFLIK & MCGERITY
1500 Broadway, 21st Floor
New York, New York 10036
(212) 757-0400
Attorneys for Petitioner

ADDENDUM

To Be Argued By:
MAX FOLKENFLIK
Time Requested: 30 Minutes

New York County Clerk's Index No. 111287/06

COURT OF APPEALS
STATE OF NEW YORK

JEAN BOUDREAUX, and the victims of the Flood on April 6, 1983, on the Tangipahoa River,

Plaintiffs-Appellants,

—against—

THE STATE OF LOUISIANA, DEPARTMENT OF TRANSPORTATION, *et al.*,

Defendants-Respondents.

REPLY BRIEF FOR PLAINTIFFS-APPELLANTS

MAX FOLKENFLIK
FOLKENFLIK & MCGERITY
1500 Broadway, 21st Floor
New York, New York 10036
Telephone: (212) 757-0400
Facsimile: (212) 757-2010

Attorneys for Plaintiffs-Appellants

Date Completed: August 11, 2008

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* * *

The fact that such a New York judgment against the state of Louisiana was entered on behalf of citizens of Louisiana, rather than citizens of New York, would not be a basis to deny enforcement. To deny enforcement of a New York judgment held by Louisiana citizens, while enforcing such judgments if held by New York citizens, would transgress the Privileges and Immunities Clause of the United States Constitution. U.S. Constitution, Article IV Section 2.[14]

CONCLUSION

This Court is faced with a choice where it must either respect the final judgment of the Louisiana Courts, or cede complete control over enforcement in New York to the Louisiana legislature. Only one of those choices respects the rule of law and the law of New York. The Louisiana Judgment should be enforced.

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[14] Article IV, § 2 of the United States Constitution provides:

> Sec. 2, Cl 1. Privileges and immunities of citizens.
>
> The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

U.S. Const. Art. IV, § 2, Cl 1

The object of the Privileges and Immunities Clause is to "place[ ] the citizens of each State upon the same footing with the citizens of other States, so far as the advantages resulting from citizenship in those States are concerned." *Lunding v. New York Tax Appeals Tribunal*, 522 U.S. 287, 296 (U.S. 1998) *citing, Paul v. Virginia*, 75 U.S. 168, 8 Wall. 168, 180. 19 L. Ed. 357 (1869).

Add. 3

To Be Argued By:
MAX FOLKENFLIK

New York County Clerk's Index No. 111287/06

NEW YORK SUPREME COURT
APPELLATE DIVISION—FIRST DEPARTMENT

JEAN BOUDREAUX, and the victims of the Flood on April 6, 1983, on the Tangipahoa River,

Plaintiffs-Appellants,

—against—

THE STATE OF LOUISIANA, DEPARTMENT OF TRANSPORTATION, *et al.*,

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REPLY BRIEF FOR PLAINTIFFS-APPELLANTS

MAX FOLKENFLIK
FOLKENFLIK & MCGERITY
1500 Broadway, 21st Floor
New York, New York 10036
(212) 757-0400

Attorneys for Plaintiffs-Appellants

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* * *

Defendant urges is intensely factual. Any number of separate Federal constitutional provisions are implicated, including Article IV, Section 1, the Full Faith and Credit Clause, Article IV Section 2, the Privileges and Immunities Clause, the 14th Amendment right to Due Process of Law, as well as the statutory construction of Article 54 of the C.P.L.R. While this Court need not reach the merits to dispose of this appeal, should it do so, the IAS court and Defendant are simply wrong on the merits.

Article 54, however, requires no showing of likelihood of success on the merits to effectuate the registration of a foreign judgment. "Sister-State judgments are presumed valid and are entitled to prima facie recognition . . ." *Overmyer v. Eliot Realty*, 83 Misc. 2d 694, 705 (Sup. Ct. Westchester 1975). *Accord*, *Baker by Thomas v. GMC*, 522 U.S. 222, 233 (1998) (final judgment by a court with jurisdiction "qualifies for recognition throughout the land.").

Article 54 does not require, or even allow, the clerk to scour the law of the rendering state looking for statutory provisions such as those here at issue before registration is granted. Registration is ministerial and performed by the clerk without judicial intervention. But for the fortuity that there were certain non-substantive irregularities with respect to the Louisiana Judgment which required correction to

* * *